United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,027

A. D. TRUNDLE,

Appellant,

v.

SAM CLAMMER and
KATHERINE CLAMMER,

and

J. B. SHAPIRO,

and

M. E. VELASCO,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Whether the trial court erred in granting summary judgment motions for appellees, defendants below, against appellant real estate broker's claim, under an implied contract of agency, for commission for being the procuring cause of a sale of certain Montgomery County, Maryland, real estate owned by appellees Sam Clammer and Katherine Clammer, and/or,

2. Whether the trial court erred in granting summary judgment motions for the appellees against the appellants' claim for commission and exemplary damages for appellees' intentional and willful interference with an advantageous contractual relationship, impliedly established between appellant broker and appellee sellers.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked under Title 28, § 1291 of the United States Code Annotated which provides for appellate review from all final decisions of the District Courts of the United States. The court below granted appellee's motions for summary judgments as to all counts of the complaint herein, constituting a final order from which this appeal is taken.

STATEMENT OF THE CASE

The appellant, plaintiff below, is a resident of Montgomery County, Maryland and a licensed real estate broker engaged principally in the business of brokering large tracts of land in Montgomery County, Maryland. (JA 1) Appellees Sam Clammer and Katherine Clammer, defendants below, and George Fuller, a California resident, from 1952 to 1964 were owners of certain real estate, a farm located in Montgomery County, Maryland containing approximately 635 acres, more or less, located on route 28, Beallsville, Montgomery County, Maryland. (JA 2) Appellee J. B. Shapiro, defendant below, at said times was and is a real estate broker, speculator and builder, having been in business since 1919, who was contacted several times by the appellant about buying the farm in question and who, in 1964, purchased the farm through a straw party, appellee M. E. Velasco, now known as Mrs. J. B. Shapiro, defendant below, who subsequently deeded the property over to Appellee J. B. Shapiro and his brother, Maurice Shapiro (JA 2).

In 1960 or 1961 the appellant approached and discussed with appellee Sam Clammer the matter of selling his farm, the latter stating, in effect, that he was not too anxious to sell but would sell if the price was right, $400,000.00 net to him. They also discussed the asking price for the farm on the basis of $700.00 per acre for 630 acres in order to allow for appellant's broker's commission. (JA 6) Thereafter, in the spring or early summer of 1963, appellee J. B. Shapiro contacted appellant stating, in effect, that he had $1,000,000.00 to invest and wanted to know what he, appellant, had to offer. Thereafter, appellant went to his office and brought several properties to his attention. (JA 7)

Appellant and appellee Sam Clammer, J. B. Shapiro and his brother Maurice Shapiro met at the farm in late summer or early fall of 1963 and viewed the property, although the length of time spent there and how much of the farm and improvements were viewed is in dispute. (JA 7, 9) Appellee J. B. Shapiro never had any prior business dealings with

appellee Sam Clammer and, in fact, did not recall ever having met him before. (JA 17) Appellee J. B. Shapiro, on prior occasions, was a social guest of a former owner, Harry Sherby, but was not familiar with the farm for the purpose of buying it. (JA 17)

Thereafter, on or about October 14, 1963 appellee J. B. Shapiro, through appellant, submitted to appellee Sam Clammer a contract offer to purchase the farm for $320,000.00 accompanied by a $25,000.00 deposit check signed by him. (JA 10-11) This contract offer contained a five per cent broker's commission. (JA 11) Thereafter, appellant attempted to contact appellee J. B. Shapiro over the following months but was unable to see him or talk to him about the farm, the appellant getting the impression that he was avoiding him. (JA 12)

David Simon, a real estate broker in Washington, D. C. but not licensed in Maryland, was contacted by appellee J. B. Shapiro sometime in June or July, 1964 concerning the farm. (JA 24) He was paid a $5,000.00 fee by appellee J. B. Shapiro for allegedly negotiating the contract. (JA 28) Simon submitted a $350,000.00 contract offer dated August 6, 1964 to appellee Clammer which was rejected. (JA 25) A contract dated August 8, 1964 in the amount of $400,000.00 net to seller was accepted August 11, 1964 by appellees Sam Clammer and Katherine Clammer. (JA 25)

Appellee J. B. Shapiro and Maurice Shapiro in May or June of 1964, knew that appellee Sam Clammer would not take less than $400,000.00 net. (JA 37) When the contract offer that was accepted was presented to Clammer, Simon revealed who the real purchasers were. (JA 28) Title to the farm was conveyed by deed from sellers to appellee M. E. Velasco who subsequently conveyed the property to appellee J. B. Shapiro and his brother Maurice Shapiro. (JA 21) Appellee Velasco, a straw party, paid nothing toward the purchase of the farm. (JA 19)

STATUTE INVOLVED

Article 2, Section 17, Annotated Code of Maryland:

> "Whenever, in the absence of special agreement to the contrary, a real estate broker employed to sell, buy, lease or otherwise negotiate real or leasehold estates or mortgages, or loans thereon, procures in good faith a purchaser, seller, lessor or lessee, mortgagor or mortgagee, borrower or lender, as the case may be, and the person so procured is accepted as such by the employer, and enters into a valid, binding and enforceable written contract of sale, purchase, lease, mortgage, loan or other contract, as the case may be, in terms acceptable to the employer, and such contract is accepted by the employer and signed by him, the broker shall be deemed to have earned the customary or agreed commission, as the case may be, whether or not the contract entered into be actually into effect, unless the performance of such contract be prevented, hindered or delayed by any act of the broker."

STATEMENT OF POINTS

The trial court erred in granting defendants' motions for summary judgment on both counts in the complaint.

SUMMARY OF ARGUMENT

From the facts in the depositions a jury could arrive at different conclusions as to what or who was the procuring cause of this sale which was admittedly to J. B. Shapiro and his brother. A jury could find that either the newspaper advertisement of the auction under the threatened foreclosure as referred to by J. B. Shapiro was the procuring cause of the ultimate sale, or that appellant's efforts in arranging a meeting between appellees Sam Clammer, J. B. Shapiro and his brother Maurice Shapiro at the farm and viewing it,

and his follow-up effort thereafter, were the procuring causes of the ultimate sale.

From the total circumstances involving the conversations and actions of appellant and appellee Sam Clammer the jury could properly find an implied contract, implied from the words and conduct of the parties under the circumstances. The jury could also find no such contract but that the appellant through his efforts, after having been permitted by appellee Sam Clammer to bestow upon him the benefit of his work and efforts in sparking the interest of J. B. Shapiro in the farm, and laying the foundation of a negotiation which ultimately led to a sale, would be entitled to receive the reasonable value of his services under Article 2, section 17 of the Annotated Code of Maryland.

From the facts and reasonable inferences therefrom, a jury could find that all defendants intentionally and knowingly interferred with appellant's contractual relationship with appellee Sam Clammer to appellant's financial loss, thereby committing a tort, giving rise to compensatory as well as exemplary damages.

Where there is a possibility of performance of an agreement within a year, the provision of the Statute of Frauds that such an agreement not to be performed within the space of one year from the making thereof must be in writing, is not applicable.

These basic issues are in conflict in the evidence and must be resolved by the trier of the facts.

ARGUMENT

I.

Summary Judgment Should Not Be Granted Where There Are Disputed Facts.

It is axiomatic that the function of a summary judgment procedure is not to try a case or to decide issues of fact, but merely to determine whether there are issues of fact to be tried. *Sedgwick v. National Savings & Trust Co.*, 76 U.S. Appeals D.C. 177, 130 F.2d 440; C.J.S., Judgments, Sections 219, 220; *Dyde Wey v. Clark*, 180 F.2d 772 (Calif., D.C. 1950), *Heise and Bruns Mill and Lumber Co., v. Goldman*, 125 Md. 554 (1915) involved a suit by building supplier against a building contractor, owner, and developer of real estate for building supplies furnished. The question of agency arose and on appeal the court stated:

> "It is the undoubted rule of law of this state, and practically universal, that it is not for the court to determine the questions of agency vel non, but to determine whether there is any evidence tending to prove the agency, and if there is any such proof, although not full and satisfactory, it is the exclusive province of the jury to judge of its weight. Whether there be any evidence or not is a question for the judge; whether it is sufficient evidence is a question for the jury."

II.

From the Words and Actions of the Parties Involved Under the Circumstances, the Jury Could Find an Implied Contract of Agency Between Appellant and Appellee Sam Clammer or a Subsequent Ratification of Previously Unauthorized Acts.

In *Heslop v. Dieudonne*, 120 A.2d 669, 209 Md. 201 (1956) a broker was given an exclusive listing for the sale of real estate, but after it expired he showed the ultimate vendee the property. After the expiration, there was no written contract or even an express oral contract of an appointment as between the broker and vendor. In sustaining the lower court's finding for the broker, the court of appeals held that where the appellee broker requested permission to show the property of the appellant, vendor, to the prospective vendee, both parties obviously realized the type of relationship that was being created between them. The vendor wanted to sell and allowed the appellee broker to show the property to prospective buyers and did thereby impliedly contract to use the appellee broker as an agent for the purposes of that sale. In accord: *Snedker v. Baltimore Brick Company*, 198 Md. 499, 84 A.2d 868.

The Court in *Heise & Bruns Mill and Lumber Co. v. Goldman, supra*, stated:

> "The relation of principal and agent does not depend upon an express appointment and acceptance thereof, but it may be implied from the words and conduct of the parties and the circumstances."

In *Baltimore and Ohio Railroad Company v. Jones and Laughlin Steel Company*, 138 Md. 604, the Court stated:

> "An agency may be implied from conduct and need not be proven by evidence of an express appointment."

In accord: *Weinberg v. Desser*, 243 Md. 347, 221 A.2d 66 (1966); *Hogan v. Q. T. Corporation*, 230 Md. 629, 185 A.2d 491 (1962).

Appellee Sam Clammer said he would sell if the price was right. He knew appellant was a broker selling real estate and further knew that appellant was actively trying to find a purchaser when he agreed, and, in fact, met appellant and appellee J. B. Shapiro and his brother Maurice Shapiro at the farm, showed them the house and permitted them to view other parts of the farm. It is also admitted that appellee J. B. Shapiro ultimately purchased the property through a straw party, appellee M. E. Velasco, now known as Mrs. J. B. Shapiro. Appellee Sam Clammer, a practicing attorney with experience in real estate matters (JA 29) should have known that his words, actions, and the total circumstances involving his relationship with appellant impliedly created a contractual relationship. When he was informed by David Simon, a straw broker, that J. B. Shapiro was the real purchaser at the time the final contract for $400,000 net to him was presented, he, at that time, should have realized that he would be obligated thereafter to pay appellant his fee.

From the above facts in the depositions and reasonable inferences therefrom, a jury could find a implied agency contract between appellee Sam Clammer and appellant, and under Article 2 Sec. 17, Md. Code, that appellant was entitled to the customary fee, even though said appellee stated that the lowest he would accept was a net figure. See *Heslop v. Dieudonne, supra.*

III

The Facts and Inferences Therefrom Permit the Finding by the Jury That Appellant Was the Procuring Cause of the Sale.

A leading case in Maryland on this point is *Buchholz v. Gorsuch*, 144 Md. 62, 124 A. 389 (1923) which involved a suit for broker's commission arising out of sale of real estate. The facts are that the broker had a listing on the property for sale on a 5% commission basis. After advertising the property it was brought to the attention of the eventual

buyers who inspected it. Thereafter the buyers approached the sellers and a final price was agreed upon which was less than the original price listed by the broker. On appeal, the court affirmed the judgment for the plaintiff broker below and stated:

> "That prerequisite to recovery is satisfied if the testimony admits of the inference that the sale was accomplished as a result of the appellee's action in discovering the purchasers, showing them the property and referring them to the appellant for further negotiations. The fact that the sale was effected by direct agreement of the vendors and vendees does not disentitle the appellee to commission if his effort may fairly be regarded as the procuring cause of that result."

In accord: *Bearman v. Roland Park Realty Company*, 218 Md. 515, 147 A.2d 697; *Jones v. Adler*, 34 Md. 440.

In *Blake v. Stump*, 73 Md. 160, 10 L.R.A. 103 the Court stated,

> "It is well settled, if the agent introduces or discloses the name of the purchaser, and such introduction or disclosure is the foundation upon which negotiations are begun and the sale effected, he will be entitled to commission, and this too, although in point of fact the sale may have been made by the owner. In other words, he cannot avail himself of the services and by making a sale through information derived from the agent, deprive the latter of his commission."

A broker is entitled to a commission for a sale where it appears that he either was employed by the vendor, or if he acted without precedent authority but the vendor ratified his unauthorized acts, and secondly, that his acts were the procuring cause of the sale. *Snedker v. Baltimore Brick Company, supra.*

In the case of *Cowal v. Marletta*, 216 Md. 222, 139 A.2d 712 (1958) a plaintiff broker sued for a real estate commission in a factual situation where the ultimate purchasers de-

nied finding out about the property from or through the broker's ad, whereas the plaintiff broker testified that one of the purchasers had called him in response to his ad. After the jury found for the broker the Circuit Court for Prince George's County set it aside and granted a J.N.O.V. to the defendant. The Court of Appeals reversed and stated:

> "The fact that in this case the broker did not actually exhibit the business to the purchasers or negotiate with the owner, or participate in the execution of the agreement of sale, would not disentitle him to commission if, in fact, his efforts in advertising it and discussing the matter by telephone with Hale were the procuring cause of the sale."

It is uncontroverted that appellee J. B. Shapiro did not make a contract offer after he read the auction ad but he made successive contract offers after appellant actively entered the picture and ultimately made a deal through another broker. From these facts a jury could find appellant to have been the procuring cause of the sale.

IV.

The Statute of Frauds Does Not Defeat This Action Merely Because the Agreement Between Appellant and Appellee Sam Clammer Was Not in Writing

The Statute of Frauds requiring that an agreement not to be performed within the space of one year is unenforceable unless it be in writing, does not bar this action. The Maryland law on this point is stated in *H. J. McGrath Co. v. Marchant*, 117 Md. 472 (1912), which involved an oral employment contract for the period of one year, providing that the defendant company continued in business that long and further specified a particular salary. Plaintiff employee was fired within the period of one year from the making of this contract and sued for breach of contract. The verdict and judgment was for the plaintiff employee and was affirmed on appeal. The appellate court rejected the defense of the Statute of Frauds and stated that it will not be applied where

the contract can, by any possibility, be fulfilled or completed in the space of a year, although the parties may have intended its operation to extend to a much longer period. *Lucke v. Clothing Cutters, etc., supra,* quoting from the English case of *Benten v. Pratt,* 2 Wendell 35, stated: "When a contract would have been fulfilled but for the faults and fraudulent representations of a third person, the action would lie against such person, although the contract could not have been enforced by action." In accord: *Cumberland Glass Manufacturing Company v. Dewitt, infra.*

V.

Appellees Can Be Liable To Appellant in Tort for an Intentional Interference With His Contractual Relationship With Appellee Sam Clammer

Lucke v. Clothing Cutters and Trimmers Assembly, Md. 7507, K of L (1893) 77 Md. 396, is the earliest reported case in the State of Maryland on the question of wrongful or tortious interference with an advantageous contractual relationship. This case involved the alleged wrongful actions on the part of a labor union in forcing a non-union employee, the plaintiff below and appellant, out of a job, by a threatened boycott of the employeer. A demurrer to the declaration was sustained by the lower court with leave to amend and affirmed on appeal. The court recognized the cause of action of a wrongful interference by fraud or force of the free exercise of another's trade or occupation—recognizing that it is a tort. The Court cited with approval *Lumley v. Guye,* (1853) 2 El. & Bl. 216.

Knickerbocker Ice Company v. Gardiner Dairy Company, (1908) 107 Md. 556 involved the plaintiff Dairy company which had a contract with the S. Ice Company to purchase ice from S company during a certain season. The S. Company also procured large quantities of ice from defendant Knickerbocker Ice Company and the defendant knew of the existence of the prior contract and, intending to obtain a

benefit for himself, notified S. Company that if it sold ice to the plaintiff, the defendant would refuse to supply any ice to it. Consequently, the S. Company broke contract with the plaintiff who was compelled to purchase ice at a higher price elsewhere. The Court held that the defendant was liable for the loss caused for the plaintiff Dairy Company. The Court, at page 566, stated the general principle that,

> "If wrongful or unlawful means are employed to induce the breach of a contract, and injury ensues, the party so causing the breach is liable in an action of tort. Express malice is not necessary if the act is wrongful and unjustifiable."

Cumberland Glass Manufacturing Company v. Dewitt, 120 Md. 381 (1913) involved an oral contract between Dewitt, the plaintiff below, who had an oral contract with the Mallard Distillery Company to supply gin bottles, and defendant Cumberland Glass Company which wrongfully, and with the purpose of injuring plaintiff and benefitting itself, caused a breach of his contract. A jury verdict and judgment for the plaintiff Dewitt was affirmed on appeal. No exemplary damages were claimed.

HELD:

The Narr or declaration alleged a good cause of action for wrongful interference of a contractual relationship. On the question of malice the Court stated,

> "Malice in this form of action does not mean actual malice, or ill will, but consists of an intentional doing of a wrongful act without legal justification or excuse."

And, quoting from *South Wales Miners Federation v. Glamorgan Coal Company*, appeal cases, (1905) 239, as follows:

> "Bearing in mind that malice may or may not be used to denote ill will, and that in legal language presumptive or implied malice is distinguishable from express malice, it conduces to clearness in discussing such cases as these to drop the word malice altogether and

> and to substitute for it the meaning which is really intended to be conveyed by it. Its use may be necessary in drawing indictments, but when all that is meant by malice is an intention to commit an unlawful act, without reference to spite or ill will, it is better to drop the word malice and so avoid all misunderstanding."

Again the Court quoted from the *Knickerbocker Ice Company case, supra*:

> "Although many of the cases speak of the act as being maliciously done, it would seem to be clear that express malice is not necessary if the act is wrongful and unjustifiable."

The Court further quoted from the following case: *Mogul Steamship Company v. McGregor Gow and Company*, (1892) appeal cases 25,

> "that the procuring of people to break their contracts is an unlawful act."

No Maryland case has been found wherein exemplary damages were claimed and allowed in a contract interference situation. However, in *Webster v. Woolford* (1895) 81 Md. 329 the Court of Appeals recognized the right to exemplary damages in some cases founded on contract. Although the Court didn't permit exemplary damages in the *Cumberland Glass Manufacturing Company case, supra*, they have been allowed in cases of intentional trespass, *Atlantic and George's Creek Consolidated Coal Company v. Maryland Coal Co.*, 62 Md. 135; for patent infringement and misappropriation of trade secrets, *Carter Products, Inc., v. Colgate-Palmolive Co.*, 214 F. Supp. 383 (D.C. Md. 1963), in false imprisonment cases, 11 M.L.E. p. 84 and cases cited; and other situations such as libel and slander, assault and battery cases where such damages are universally allowed. An article in 55 Ky. L. J. 682 (1907) reviews cases that permit a recovery in tort and allow exemplary damages in cases of interference with the attorney-client relationship. Leading cases cited are: *Herron v. State Farm Mutual Ins. Co.*, 14 Calif. Reporter 296,

363 P.2d 310, 1961; *Richette v. Solomon*, 410 Penn. 6, 187 A.2d 910, 1963.

Such damages were recently permitted in *McClung-Logan Equipment Company, Inc. v. Thomas*, 226 Md. 136, 172 A.2d 495 (1961). The seller of a tractor had brought replevin against the buyer. On a counterclaim for wrongful seizure and detention, the buyer was awarded $9,975.01 (less $500 remittitur) for damages claimed by the wrongful seizure of the tractor by the seller, aggravated by the wanton, willful, and malicious conduct of the seller. Affirmed on appeal. The Court of Appeals said:

> "That punitive damages are allowed in such cases and that such an instruction is proper is clearly established. The legal principles, as stated in the instruction, in almost identical terms, have been repeatedly sanctioned by the Maryland cases. (citing 10 cases, Am Jur and Poe) . . . . Malice, fraud, deceit and wrongful motive are most often inferred from acts and circumstantial evidence. They are seldom admitted and need not be proved by direct evidence. (citing cases)"

The trend in recent cases is to permit the jury to consider the matter of exemplary damages in cases of intentional torts.

William L. Prosser of Law on Torts, 3rd Ed. p. 972, states that cases generally will permit an award of damages against not only the contracting party, but also the person who induces the breach. Most of the cases dealing with the question of damages have treated the tort as an intentional one, as has Maryland, and have allowed recovery for punitive damages.

VI.

Issues as to Credibility and Demeanor of Prospective Witnesses Should Not Be Resolved by Summary Judgment.

Another factor to be considered is the credibility of witnesses and the need for cross-examination and need for demeanor testimony. *Moore's Federal Practice*, Vol. 6, p. 2401. The general and well-settled rule is that the court should not resolve a genuine issue of credibility at the hearing on a motion for summary judgment and if such an issue is present, the motion should be denied and issue resolved at trial by the appropriate trier of the facts who will have the opportunity to observe the witness' demeanor. It has been said that a witness' demeanor is a kind of real evidence. *Moore's Federal Practice*, Vol. 6, pp. 2367 and 2368; *Pollen v. Columbia Broadcasting System*, 82 S. Ct. 486, 368 U.S. 486.

Appellee J. B. Shapiro denies knowing that appellant was interested in trying to put together a deal for the sale of this property (JA 20), yet in October 1963 this appellee made a contract offer in the amount of $320,000 accompanied by a $25,000 deposit check signed by him through appellant to appellee Sam Clammer. (Maurice Shapiro Deposition Exhibit 2, Appellant Deposition, JA 10). Appellee Sam Clammer denies that Simon ever told him J. B. Shapiro was the real party in interest (Appellee Clammer Deposition, JA 33), yet according to Simon, when he offered the contract which was ultimately accepted he revealed the real party in interest. (Simon Deposition, JA 28) It is incredible that appellee Sam Clammer was so blase and unaffected by the $320,000 contract offer in October 1963, that he never even bothered to observe the $25,000 deposit check accompanying this contract offer which check contained the name of Shapiro in five different places. When appellant, appellee J. B. Shapiro, Sam Clammer and Maurice Shapiro met at the farm, appellee J. B. Shapiro stated that he neither looked through the house nor drove about the farm (JA 18-

19); Maurice Shapiro stated that they did not enter the house, but they did drive about part of the farm (JA 35-37); appellee Sam Clammer stated that he did show them through the house; appellant stated that appellee Sam Clammer showed them through the house and thereafter, drove about the farm (JA 9-10). These facts are in conflict on the important question of how much of the farm and improvements Appellee J. B. Shapiro and his brother saw on the morning in question and how much interest this view and meeting with the owner generated.

These disputed facts on important issues in this case under the applicable law, cannot be resolved by summary judgment but must be resolved by the trier of the facts who will have the opportunity of observing the demeanor of the witnesses and determining their credibility.

CONCLUSION

In conclusion, Appellant contends that the trial judge was in error in granting defendants' motions for summary judgment in that the disputed factual issues must be resolved by the trier of the facts and not by way of summary judgment.

Respectfully submitted,

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CONTENTS OF THE APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

A. D. TRUNDLE
4927 Auburn Avenue
Bethesda, Maryland

Plaintiff

vs

SAM CLAMMER and
KATHERINE CLAMMER
4000 Massachusetts Avenue, N. W.
Washington, D. C.

and

J. B. SHAPIRO
1456 Legate Road, N. W.
Washington, D. C.

and

M. E. VELASCO
1456 Legate Road, N. W.
Washington, D. C.

Defendants

Civil Action No. 2343-65

COMPLAINT FOR REAL ESTATE BROKERS COMMISSION

Count One

1. This Court has jurisdiction in that the amount in controversy exceeds $10,000.00 besides interest and costs.

2. On or about September 1, 1963 plaintiff, a licensed real estate broker in the State of Maryland and active in real estate matters in Montgomery County, Maryland, all of which was known to defendants Sam Clammer and J. B. Shapiro, entered into an agreement with defendants Sam Clammer and Katherine Clammer, hereinafter called Sellers, to sell certain real estate, a farm located in Montgomery County, Maryland, owned by them and others, containing approxi-

mately 635 acres, more or less, on Route 28, Beallsville, Maryland. It was understood and agreed that for his services plaintiff would receive a commission of 5% of sales price of the property.

3. Subsequent thereto plaintiff informed defendant J. B. Shapiro, hereinafter called Buyer, of this farm, showed him the farm in question and introduced him to defendant Sam Clammer who thereupon described the premises in great detail to buyer who went on a tour of the farm and showed great interest therein. Purchase and sale negotiations were conducted by plaintiff between defendant Sam Clammer and buyer over the next several months during which time a written contract offer by buyer to sellers was rejected.

4. Defendant Sam Clammer, in his words and deeds throughout his contacts with plaintiff, held himself out as having the apparent authority to list the farm for sale for his wife, known to plaintiff to be a part owner, as well as any other co-owner thereof.

5. Subsequent thereto, on or about October 1, 1964, buyer, through a straw party, defendant Velasco, contracted with defendant Sam Clammer to purchase said farm and subsequently, deeds were executed from Sellers and one George E. Fuller, to Velasco and then from Velasco to buyer.

6. Buyer first heard of the farm and its availability for purchase through plaintiff who not only introduced him to defendant Sam Clammer but continued to contact them over a period of months. Plaintiff's efforts on sellers' behalf was the foundation of a negotiation that later resulted in a sale of the farm to buyer for a purchase price believed to be $400,000.00. Plaintiff had produced a buyer who was ready, willing and able and did in fact buy the farm. Plaintiff made a demand upon defendant Sam Clammer for his commission and was refused.

WHEREFORE, plaintiff demands judgment against defendants Sam Clammer and Katherine Clammer and each of them in the amount of $20,000.00 besides costs.

Count Two

7. Paragraphs one through six of Count One are incorporated herein and made a part hereof as if specifically set forth herein.

8. On or about October 1, 1964 after the buyer had been introduced to sellers and the farm in question through the sole efforts of plaintiff, the buyer, sellers and defendant Velasco did thereupon conspire and act with full intention and knowledge to deprive plaintiff of his commission and did thereupon enter into a contract which later resulted in deeds of conveyances of the farm executed by and between the sellers and the straw party, defendant Velasco and the buyer, the real party in interest. All of these acts were done without the participation of, knowledge or acquiescence of the plaintiff. The defendants did thereby knowingly and intentionally interfere with an advantageous contractual relationship by and between the plaintiff and sellers and did thereby intend and did in fact deprive plaintiff of his commission.

WHEREFORE, plaintiff demands judgment against all defendants and each of them in the amount of $20,000.00 compensatory damages besides costs and $200,000.00 punitive damages besides costs.

SORRELL, JONES & PAULSON

By:

Richard S. Paulson
Attorney for Plaintiff

Plaintiff demands a trial by jury.

SORRELL, JONES & PAULSON

By:

Richard S. Paulson

JOINT ANSWER OF DEFENDANTS J. B. SHAPIRO AND M. E. VELASCO

Come now the defendants J. B. Shapiro and M. E. Velasco and for an answer to the Complaint herein respectfully show to this Honorable Court as follows:

First Defense

The Complaint fails to state a claim upon which relief can be granted against these defendants or either of them.

Second Defense

Answering the Complaint in correspondingly numbered paragraphs, these defendants state as follows:

1. Admitted.

2. Answering the allegations of Paragraph 2, defendants state that they are without knowledge or information sufficient to form a belief as to the truth of said paragraph and therefore neither admit nor deny the same but demand strict proof thereof.

3. Answering the allegations of Paragraph 3, defendants state that they are without knowledge or information nor do they recall as to whether or not a written contract for the purchase of the property was submitted by defendant J. B. Shapiro to the owners of the property and therefore neither admit nor deny the same, and said defendants deny all the remaining material allegations of said paragraph.

4. Denied.

5. Answering the allegations of Paragraph 5, defendants state that the contract for the purchase of the property was entered into on or about August 11, 1964, and admit the remaining allegations of said paragraph.

6. Denied.

7. The answers to Paragraphs 1 through 6 above are incorporated herein by reference.

8. Denied.

WHEREFORE, defendants J. B. Shapiro and M. E. Velasco, having fully answered the Complaint, pray that the same be dismissed with costs to the plaintiff.

MELROD, REDMAN & GARTLAN

/ /s/ Joseph V. Gartlan, Jr.
/s/ Leonard S. Melrod

[Certificate of Service]

ANSWER OF DEFENDANTS CLAMMER

Defendants Sam and Katherine Clammer, for their answer to the complaint herein, aver:

1. With respect to paragraph 2 thereof, are without knowledge or information sufficient to form a belief as to the licensing or business activities of plaintiff, deny all other matters therein set forth, and affirmatively aver that plaintiff pursued these defendants over a period of time asserting the value of his services and his ability to produce a buyer ready, willing and able to purchase the farm of these defendants at a price which would net them $400,000, and these defendants gave plaintiff the same response as made by them to all other inquirers, namely that they would sell the property to any purchaser who would pay such a price and no commissions of any kind would be paid to any broker by these defendants.

2. Answering paragraph 3 thereof, aver that these defendants knew J. B. Shapiro before any introduction by plaintiff; are without knowledge or information as to whether the said defendant was shown the farm before or after plaintiff appeared with him, admit that these defendants rejected all offers for the farm which were less than $400,000 net to them, and, except as so averred deny all matters therein set forth.

3. Deny the averments of paragraph 4 thereof.

4. With respect to paragraph 5 thereof, admit that these defendants sold the farm on the terms demanded by them to defendant M. E. Velasco; are without knowledge or information sufficient to form a belief as to the relationship, if any, existing between the other defendants, and, except as so stated, deny all other averments therein.

5. Deny the averments contained in paragraphs 6 and 8 thereof.

FOR A SEPARATE DEFENSE

6. Aver that the complaint must be dismissed for the lack of any note or memorandum in writing signed by these defendants for the commission demanded therein.

/s/ Geo. S. Leonard

Excerpts from Deposition of A. D. Trundle, Nov. 18, 1965

* * *

A. D. TRUNDLE

* * *

EXAMINATION BY COUNSEL FOR DEFENDANT SHAPIRO

BY MR. MELROD:

* * *

Q. Did he authorize you back then to sell the farm? [4] A. Our conversation was this: I went in and introduced myself and handed him my card and asked him if he wanted to sell his farm and he said, well, he wasn't too anxious about it. I said, well, if you did want to sell it, what would you ask for it? He said $400,000 net to me. I said well there are 630 acres. In that case I will have to price it at $700 an acre to – in order to collect a commission. He said no, there is 660–some acres. I said, well, the map and deed don't call for that. He said, I bought 30 acres additional.

Q. Now, at that time, this was back in 1960, you be-

lieve? A. It was about that time. Several years prior to this transaction.

Q. Now, this transaction according to your complaint, took place – A. In the late summer or the fall of 1963.

Q. Of 1964? A. 1963.

Q. You believe it was in 1963? A. When I first met Mr. Shapiro and his brother up there, yes.

Q. 1963? A. That's right.

Q. Can you fix the month? [5] A. Sir?

Q. Can you fix the month? A. No, it was in late summer or early fall, because Mr. Clammer was very emphatic about the heating plant in the house, so I figured it was getting along toward fall.

Q. Now, when was the first time that you talked to Mr. Shapiro about the farm? A. That was in the spring of 1963, along middle summer, sometime in the early part of summer.

Q. Can you tell us how it came about that you talked to him about this farm? A. Well, he called me up over the phone and said he had sold some property and he had a million dollars to invest, he wanted to know what I had to offer. I went down to his office and brought several places to his attention and some of which he had marked on his map that some other brokers had showed him.

Q. Now, at the time that you had this conversation with him, did you have any kind of a listing from Mr. Clammer to sell his farm? A. Other than verbal, the conversation that I just discussed.

Q. And that was predicated upon what you have told us here today was your original conversation with him in 1960 [6] or 1961? A. That's right. Well, in the meantime, I had contacted him several times and his answer was always the same. Whenever I had a prospect that I thought was worth considering, I would go in to see if it varied by his price, $700 an acre looked awfully high in 1960, back there.

Q. But what you took to be your authorization and you said a verbal listing, was based upon what you tell us here he told you back in 1960 or 1961?

MR. PAULSON: I object to –

THE WITNESS: But in the meantime I had several other conversations with him.

BY MR. MELROD:

Q. But not about – you didn't have further conversations with him about listing. You had conversations about, you say, prospective purchasers? A. No, I would say what about the farm now, have you changed your price or something to that effect.

Q. What did he say? A. $400,000 net each time.

Q. He told you that he would sell it for $400,000 net? A. Net to him, yes.

Q. Do you remember taking Mr Shapiro out to see this [7] big tract of land on the Monocacy River? A. No, when I brought that to his attention, he showed me his map and I told him about this property and he said, I have already seen that property several years ago, and I don't know who the name of the man was that showed it to him.

Q. You never started out to see that property at all? A. No, never considered that property at all. He told me that somebody else had already showed it to him on the map.

Q. And you never drove out in a car to see it? A. No.

Q. And you have no recollection of driving out and his pointing out to you the Clammer farm? A. None whatever.

Q. You deny that he did that? A. I do so emphatically.

Q. Do you deny that he discussed with you the fact that the Clammer farm had been up for sale? A. I deny that.

Q. You deny that too? A. Yes.

Q. An you never had a discussion with him about that? A. Positive.

Q. Were you familiar with the fact that there had been [8] an auction sale? A. No, I was not.

Q. You didn't know. Is today the first time you have learned that? A. That's right.

Q. Now, there did come a time when you and Mr. J. B. Shapiro and Morris Shapiro went out to the farm? A.

No. I went out first and Mr. Shapiro and his brother –

Q. Met you there? A. – met us there, that's right.

Q. Did you tell Mr. Clammer that you were bringing anyone out to see the farm? A. Yes, I had an appointment to meet him there. It was on Sunday and I thought he wouldn't want to go. I told him to give me the key and I would show them the house. He had told me how much money he had spent on the house and he said no, I will meet you out there.

Q. Was Mr. Clammer there when you got there? A. Mr. Clammer was there when I got there. I came up soon afterwards and soon after that Mr Shapiro and his brother drove up.

Q. Did Mr. Clammer meet Mr. Shapiro? [9] A. I introduced them and they shook hands and that was that.

Q. Did Mr. Clammer take you through and show you the property? A. He took us through the house.

Q. Was there any discussion at that time about buying it, of price? A. There wasn't any price mentioned or discussion at all at that time.

Q. No terms? A. No, sir.

Q. No discussion about that? A. No discussion about price or terms or anything, but he showed us all through the house and particularly the heating plant in the basement, how much money he had spent on it, and how efficient it was.

Q. Now, after that, how long would you say that you stayed out there that time? A. Well – after we came out of the house, Mr. Clammer left and then Mr. Shapiro, J. B. and his brother got in my car and Mr. – the brother drove the car. I had had trouble with my eyes and they wanted to drive over the farm, so Mr. J. B. got in the back of the car and I sat in front with the brother, [10] and we drove back up to the farm to look over the farm on that side of the house and then we started down the road and J. B. said I would like to go up on the hill up there, it looks like it would be a good location for a home. He said, I will build a stone rambler up there and put my manager in this house,

so the brother drove the car and I rode in front and J. B. opened the gates and we drove up there and he picked out a spot to build his house.

Q. Now, when you had this conversation – let me take you back a minute – in 1960 or 1961, with Mr. Clammer, did you have any discussion with him about payment of your commisson? A. I told you exactly like I said in the beginning, that he priced at $400,000.

Q. So that any commission you would have to get – A. Wait a minute. Yes, I said, well at 630 acres, I will have to price it at $700 an acre to get my commission. He said there are 660 acres. I said the map doesn't show it, and he said, I bought 30 acres additional.

Q. In other words, he didn't have any understanding with you how much commission you would get. You would have to add that to the price? A. That's right, exactly.

Q. So you had no fixed arrangement with him about [11] commission? A. That's right.

Q. Did you ever find out how many acres was actually in the tract? A. No, I did not.

Q. You never did know that? A. No.

Q. And you don't know them today? A. No. Only what the map said.

Q. And you don't know it today? A. That is right, I was pricing by the acre. I priced it to Mr. Shapiro at $700 an acre.

Q. He told you he wasn't interested in buying at that price, didn't he? A. Well –

Q. Is that right? A. I am not sure whether he said that or not. I at that time – I interested him in another property immediately.

Q. Let's stick to this property. I say when you told him that you were pricing it at $700 an acre, what did he tell you? A. He said I might make an offer.

Q. Did he? [12] A. To the best of my recollection, that is what he said.

Q. I said, did he make an offer? A. Yes, in writing.

Q. In writing? A. $320,000.

Q. Do you have a copy of that offer? A. No. I haven't. When a man signs a contract, the agent's job is to turn it back to the signer and not hold it.

Q. Your recollection is that you turned it back? A. I gave them all back to Mr J. B.

Q. And you have no copies of any? A. That is right. The regulations call for turning all the copies back.

Q. The regulations call for your getting a written listing too, don't they? A. What?

Q. I said the regulations call for you to get a written listing, don't they? A. I don't know about that.

Q. You don't know about that; is that your answer; You don't know about that? A. Yes, I will say I don't know about that.

[13] Q. When you discussed this suit, did you tell your lawyers that you had a commission agreement at five percent of the sales price? A. I told them exactly what I told you.

Q. Did you ever tell anyone else that you had a commission arrangement at five percent of the sales price, your present lawyers or any other lawyers? A. I told them that was the prevailing commission. I never told them that I had any arrangements. I told them that was the prevailing rate of commission at that time.

Q. Did you tell any other lawyer that you had an arrangement for a 10 percent sales commission? A. No, I didn't.

Q. You never made that statement, is that correct?

Now, then, you never had any understanding or agreement with Mr Shapiro for him to pay you a commission, did you? A. No, sir. I told you I priced it to him at $700 an acre, which would cover my commission.

Q. Intending that it be paid by the seller? A. Yes, in that case. In fact, in this contract which I gave them, I wrote that 5 percent in it before I handed it to Mr. Clammer.

* * *

[14] Q. Did you read this complaint before it was filed? A. No. I didn't.

[15] Q. Did you ever see it? A. No, I didn't.

Q. There is an allegation in this complaint, that makes the following statement:

"On or about October 1, 1964, after the buyer had been introduced to the sellers, and the farm in question –

MR. MELROD: Off the record.

(Discussion off the record.)

BY MR. MELROD:

Q. – "through the sole efforts of plaintiff, the buyer, sellers and defendant Velasco did thereupon conspire and act with full intention and knowledge to deprive plaintiff of his commission."

Do you know of any acts to your knowledge – A. You don't have to speak so loud. Tone it down a little.

Q. – upon which that statement was based? A. It was my deduction.

Q. Deduction from what? A. From their action.

Q. What was the action upon which you made that deduction? A. Well, in the first place, Mr. J. B. Shapiro and I were very friendly for a number of years. After this contract [16] incident, I went back to him the second time, and he was – said he wouldn't give a contract until I got a written statement.

Q. Written listing, you mean? A. Yes. I went back to Clammer and he wouldn't give it. I went back to Shapiro again, and he kept me sitting in his office for about 20 minutes, so I left. In the meantime, I called him again, and he kept me waiting over the phone about 10 or 15 minutes. In the meantime, in February of 1964, I met him at a sale out there, and he was not only discourteous, but was very rude, giving me the impression he wanted to eliminate me from his contact completely.

Q. Is that what you base that statement upon? A. Partly, yes. It looked liked he was –

Q. If there is anything else you tell us. This is the time for you to state it. A. It looked like he was alienating me.

Q. It looked like he didn't want to deal with you? A. That's right.

* * *

[17] Q. I understand, but I am talking about do you know of anything of your own knowledge or any acts to your knowledge upon which you base the statement that Mr. Shapiro or Mr. Clammer conspired to defeat your commission? A. The fact that one man wanted to buy and another one [18] wanted to sell, and neither one of them would budge. It looked like they were holding off for a certain secret arrangement probably.

Q. And that is what you based it upon? A. That's right.

Q. I want to be fair to you, so there will be no misunderstanding. I want you to tell us if you know anything else. Have you told us everything upon which you based it upon? A. Yes, I think so.

* * *

Q. After you made that call to Mr. Shapiro and he kept you on the line, you didn't have any – and you saw him this one time out at a sale and he didn't discuss the farm with you then, did he? A. No, no, he wanted to alienate me. He wasn't talking to me. He was very discourteous. In fact, he said he wasn't going to have anything to do with anybody that didn't know anything about real estate.

[19] Q. And you had no contact with Mr. Shapiro in connection with this farm? A. That's right.

Q. Other than what you have told us here today? A. That's right. That's right.

Q. And I believe you told us you had no agreement with him that he would pay you any commission? A. That's right.

* * *

[22] EXAMINATION BY COUNSEL FOR PLAINTIFF

BY MR. PAULSON:

Q. Mr. Trundle, how long have you been in the real estate business in Montgomery County? A. 15 to 20 years.

* * *

[23] Q. Well, how long have you known the farm, even before this real estate transaction came up? A. Oh, all my life. I was raised in that neighborhood and I am familiar

with that farm ever since boyhood. That is why I was familiar with it, interested in it.

Q. In your contacts with Mr. Shapiro, Mr. J. B. Shapiro about this farm, did he ever ask you questions about it? A. I don't recall that he did.

Q. In your experience in real estate in the last 15 or 20 years that you have mentioned, was there any particular phase of real estate that you have devoted most of your time to? A. To large acreage and estates.

Q. That would be large acreages similar to the Clammer farm? A. That's right.

* * *

[27] Q. Good. Would you show him a copy of the complaint, please, page 3, Mr. Trundle, I will call your attention to the statement near the bottom of page 3 of the complaint and I read a phrase, "and advantageous contractural relationship by and between the plaintiff and sellers."

Are you the plaintiff? A. Yes.

Q. Who were the sellers? A. Who were the sellers?

Q. Who were the sellers? A. Clammer is the only man I talked to.

Q. What was the contractural relationship? A. Similar to that I told this man twice and told him once and you were sitting there.

Q. Will you answer my question, please, what was the contractural relationship? A. I went in to see Mr. Clammer and I handed him my card. I asked him if his farm was for sale, he said, well, I am not particular about selling it.

[28] I said, well, would you sell it? He said, yes, I will take $400,000 net. I said, well there is only 630 acres. Then in order to get a commission I will have to price it at $700 an acre. He said, there are 660 acres. I said, well the map and the deed doesn't say that. He said, well, I purchased 30 acres additional or 30-odd acres.

Q. This is the entire series of events which you refer to in the complaint as the advantageous contractural relationship? A. Other than contacts every three months from

that time on to the time of this transaction, I would go in and see him occasionally and I would ask him if there was a change in price and tell him if I had a prospect.

Q. What change did he give you? A. Never any change. He always said $400,000 net to me.

Q. At one time you submitted a written offer on this property to Mr. Clammer? A. That's right.

Q. And have you stated that you put a 5 percent commission in that offer? A. I did.

Q. And you handed this written offer physically to Mr. Clammer? A. [29] I did.

Q. What did he do with it? A. He said – he looked at the price and said he was not interested.

Q. What did he do with it? A. He handed it back to me.

Q. Do you still have it? A. No, I gave it to, back to Mr. Shapiro.

Q. You have been in the real estate business for 15 to 20 years? A. Yes, probably longer.

Q. You started when you were about 60? A. Probably earlier than that.

* * *

[30] Q. And did you start in real estate after the war? A. No, before, and then after, more actively.

Q. Right, what is your office address? A. 4927 Auburn Avenue, Bethesda.

Q. How long have you been there? A. Since 1959.

Q. What is your home address? A. Same.

Q. You do business out of your home? A. That is right.

Q. How many employees do you have? A. None.

Q. Have you ever had any salesmen working for you? A. None.

* * *

[31] FURTHER EXAMINATION BY COUNSEL FOR DEFENDANT SHAPIRO

BY MR. MELROD:

Q. Did you have such a real estate broker's license in 1963? A. Yes.

Q. And in 1964? A. Yes, sir.
Q. And in 1965? A. Yes, sir, and in 1959 and 1960.

* * *

Excerpts from Deposition of J. B. Shapiro, November 18, 1965

* * *

[3] J. B SHAPIRO

* * *

EXAMINATION BY COUNSEL FOR PLAINTIFF

BY MR. PAULSON:

* * *

Q. And what is your business? A. Realtor and builder.

* * *

[4] Q. Are you a licensed real estate broker in Washington? A. Yes.

Q. When did you first acquire your broker's license? A. I don't remember the year, but I have been in business since 1919, and when licenses were required, we took them out. I don't remember the year. It has been many years.

* * *

[5] Q. What was your wife's maiden name? A. Marguerita E. Velasco.

Q. Is that the same person as M. E. Velasco who is a defendant in the lawsuit we are inquiring into today? A. Yes.

* * *

[6] Q. How long have you known her? A. Oh, about two years.

Q. Now, within that two-year period, to your knowledge, has she ever transacted any business dealing with real estate? A. No.

Q. Well, you mean other than having something to do with the Clammer farm that we are talking about, do you not? A. Within the two years?

Q. Within the last two years, yes, sir. A. Yes, yes.

Q. Well, it is a fact that she was a contract buyer of this farm, isn't that right? A. Yes. I thought you meant other than the matter involved here.

* * *

[14] Q. Had you ever dealt with Mr. Sam Clammer prior to this occasion? A. No.

Q. Had you ever met him prior to that occasion? A. I don't recall.

[15] I don't recall having met him.

Q. Mr. Sam Clammer is an attorney, sir. Did he ever represent you as you best recall? A. No. No.

Q. And you had never had any prior business dealings with him that you can recall? A. No.

Q. And as a matter of fact, sir, didn't you first meet him on that Sunday morning when you saw the farm? A. I believe so. I don't know unless I met him elsewhere somewhere, but I don't recall.

Q. You don't recall having met him before? A. I don't recall that I didn't meet him before.

Q. Yes, but you had never talked to him about this farm before, had you? A. I don't recall unless it was at the time it was advertised for sale at auction, and there I did talk to a lot of people, but I don't recall whether I talked with him.

* * *

[16] Q. When did Mr. Sherby own this farm? A. He sold it to Clammer. Clammer bought it, I think, about – I don't know when Clammer bought it, but Sherby owned it about 30 years and then sold it to Clammer and I was a frequent visitor there.

Q. Now, was the farm up for auction in March of 1962?

* * *

[19] MR. MELROD: You say "this farm". What do you mean?

THE WITNESS: On the way to the farm he wanted to show me, on the way to the Monocacy River, I pointed to

him, pointed out to him the Sherby farm. The Clammer farm, and said I was going to bid on it at auction and they withdrew it. He said, "I can sell it to you. Clammer is a buddy of mine." I said, "All right, if you can sell it to me, I have no objection to buying it. I was going to bid on it." So Mr. Trundle set up an appointment to inspect the farm, to talk to Clammer. It was his suggestion. My brother went with me. My brother was not with me on the inspection, on the trip, the first trip to see the farm that Trundle was going to show me. He made an appointment for one Saturday morning to inspect the farm, and when we got there on a Saturday morning, we weren't there three minutes until Mr. Clammer almost threw us out on our ears, and that is as far as we got. He got huffy, indignant, because –

MR. MELROD: Don't give cause; just give statements.

THE WITNESS: Well, he didn't want to talk to us. Not that he wouldn't talk to us, he was not ungentlemanly, but it appeared to me there was no reason why we should come out there.

BY MR. PAULSON:

Q. What did he say as you remember? [20] A. I don't remember what he said, but I didn't stay there long enough to hear it. When I knew I was not welcome, my brother and I got up and left.

Q. What other farm did you see? A. We got into the front entrance near the house where – near the entrance to the house, the main house, the manor house.

Q. You didn't get into the house at all? A. No, no.

Q. Did you have any discussion with Mr. Clammer about the details of the house? A. None, none, none.

Q. Did you tell him or did someone in your party tell him that you were interested in purchasing the farm? A. None. We didn't get that far.

Q. There was no discussion – A. None.

Q. – in the group about buying the farm? A. I think Mr. Trundle said, "I brought them out to show them the farm," and then his response was such that we left immediately. Immediately.

Q. You did not drive around the farm then on that occasion? [21] A. No, no, absolutely not.

Q. Was there another occasion when you went to the farm in Mr. Trundle's presence? A. Never.

* * *

[24] Q. Incidentally, sir, on this contract that you previously referred to, who was the real estate broker involved in that transaction? A. Dave Simons negotiated for me.

Q. Do you recall whether or not he was allowed a commission by the terms of the contract? A. He was paid a fee.

Q. What was his fee? A. $5,000.

Q. That was the flat fee? A. That's right.

Q. I presume that was paid by the seller, the sellers in this case? A. No, the purchaser paid it.

Q. Oh, you paid the fee? [25] A. That's right.

Q. Was that a result of a written agreement that you had with Mr. Simon? A. No, gentlemen's agreement.

Q. And when was he paid the $5,000 fee or commission? A. I don't remember the exact date. I don't remember the exact date.

Q. Was his fee paid at the time of the settlement? A. I don't recall whether before or after. I don't recall.

Q. Do you recall when settlement was held and where? A. Yes, Columbia Title Company.

Q. Do you recall the date or the approximate date? A. Yes, December last, I believe, 1964.

Q. Is the Columbia Title Company here in Washington, D.C.? A. Yes, yes, 1424 H Street, Northwest.

Q. Did any of Velasco's money ever go toward the purchase of this property, sir? A. No, not one cent. All checks –

* * *

[26] Q. When did you first contact Mr. David Simon about this property? A. At the time that the auction ran in the paper.

Q. You are referring to the March 1962 time? A. Yes.

* * *

[30] Q. Before a contract was entered into between Velasco and Clammer, did he ever state to you directly or indirectly what he wanted for the property? A. I never talked with him. You mean Clammer?

Q. Clammer. A. I never talked with him. How could he state? I never talked to him.

* * *

[36] Q. Did you ever deal with Mr. Clammer directly about buying that farm? A. Never.

Q. Then you only dealt with him through either Mr. Trundle or Mr. Simon, is that correct? A. I dealt with him through Mr Simon. I talked to him in the presence of Mr. Trundle.

* * *

[39] Q. Now, sir, you know that Mr. Trundle was interested in trying to put together a deal for the sale of this property? A. No.

* * *

[43] Q. Now, sir, why did you contact Mr. Simon when you had previously contacted Mr. Trundle – A. I never contacted Trundle, never, I told you that a dozen times. Do I speak the plain English?

* * *

[44] Q. Why, sir, did you contact Mr. Simon? A. Because he was the son-in-law of the former owner. He lived there for years with his father-in-law. He knew all about the property and I got the information from him that I needed to evaluate the property.

Q. Did you ask Mr. Trundle for information about the property that he didn't or couldn't give you? A. There was no occasion to ask him because I knew about the property, I showed it to him.

Q. Did Mr. Simon tell you things about the property that you didn't know? A. Yes. Yes. Yes.

* * *

[45] EXAMINATION BY COUNSEL FOR DEFENDANTS SAM CLAMMER AND KATHERINE CLAMMER

BY MR. LEONARD:

Q. I have just a couple, Mr Shapiro. Before that first meeting when you were going to see a farm that was a different farm than the Clammer farm, had Mr. Trundle ever brought the Clammer farm to your attention? A. No.

Q. After you brought the Clammer farm to his attention, did he at any time thereafter actually bring to you any message of any kind on price or otherwise from Mr. Clammer? In other words, did he ever state to you that Clammer had agreed to any particular terms or otherwise? A. No. No.

Q. Did he ever arrange an actual dealing between you and Mr. Clammer or any representative of Mr. Clammer? A. No.

Q. In your meeting with Mr. Clammer in front of his house at the time you were going to see the other farm and stopped off, did that conversation indicate to you that Mr. Trundle [46] had made any arrangements with Mr. Clammer to show the place? A. No, just the contrary.

* * *

[48] Q. At any time prior to the actual presentation of the contract and the check with your name on it, had you been presented to Mr. Clammer by any person as a purchaser, as being the purchaser? A. Never.

* * *

[49] FURTHER EXAMINATION BY COUNSEL FOR DEFENDANTS SAM CLAMMER AND KATHERINE CLAMMER

BY MR. LEONARD:

* * *

Q. Well, let me put it this way: The nominal purchaser was an M.E. Velasco. Mr. Simon was a real estate broker. Who did he purport to represent, M. E. Velasco or yourself? [50] A. He and my brother and Velasco was the contract purchaser and Simon knew, everybody else knew so far as I am concerned, that J. B. and Morris E. Shapiro were buying it.

Q. In other words, you do not know directly what Mr. Simon told Mr. Clammer in this matter? A. I wasn't there but I know what I told him. I gave him the checks. I gave him the contracts and everything else, in connection with the deal, letters of instructions to the title company.

Q. The question was directed to the period before your check was turned over, the $25,000. A. Well, so far as I know, anything that Simon did from the time he started talking to Clammer was for J. B. and Morris E. Shapiro.

* * *

FURTHER EXAMINATION BY COUNSEL FOR PLAINTIFF TRUNDLE

BY MR. PAULSON:

* * *

[51] Q. Why did you take the title in the name of M. E. Velasco instead of you and your brother directly? A. I always do. I just bought 800 acres in Virginia in the name of M. E Velasco, prior to the first. We always buy in the name of a straw. Unfortunately people think if Cafritz buys property, it is worth more money and it is the custom in the purchase of land to buy in the name of a straw. It is the custom for no other reason.

Q. To keep the price down? A. No, no, to keep the price from going up; to the contrary, to pay an honest price.

* * *

Excerpts from Deposition of David R. Simon, December 13, 1965

DAVID R. SIMON

* * *

[3] EXAMINATION BY COUNSEL FOR THE PLAINTIFF

BY MR. PAULSON:

Q. State your full name and address, sir. A. David R. Simon, 438 Woodward Building, Washington, D.C.

Q. Is that your business address? A. Business address.

Q. What is your residence address? A. 4101 Cathedral Avenue.

Q. That is also – A. Northwest.

Q. Washington, D. C.? A. Washington, D. C.

Q. Please state your profession or occupation and how long you have been in that profession. A. I have been a real estate broker since the law went into effect and for years before that, since some time in the early 30's, I would say.

Q. Is your business primarily in the District of Columbia? [4] A. Yes, I guess so, although up to a few years ago my main business was mortgages, mortgage broker, which I conducted mostly through Virginia, but real estate in Washington as such.

Q. Are you a licensed real estate broker in the State of Maryland? A. No.

Q. Have you ever been? A. No.

* * *

Q. When did you first have any business dealings concerning that property? A. In 1942, I purchased it for my father-in-law from the family – I can't think of the name now – that owned it for 90 years [5] prior.

Q. Which party did you represent in that transaction, sir; A. My father-in-law as purchaser.

Q. Who is that? A. Harry Sherby.

Q. Were you paid a commission or fee by him, the purchaser in this transaction? A. No.

Q. Were you paid a commisson by the seller? A. No.

Q. Do I understand your answer to be that you weren't paid any commission or fee or money for your services? A. That's right.

Q. Did you thereafter have any business dealings with that farm? A. Yes. I was instrumental, I think, in selling the farm to Mr. Sam Clammer, Sam and Catherine Clammer.

Q. When? A. In '52, I believe. Some time in '52. I am not sure of the exact date.

* * *

[10] Q. Directing your attention to a period of time around September or August of 1964, were you contacted by Mr. Shapiro or someone concerning his interest in purchasing the Clammer farm, if we may call it the Clammer farm for identification? A. Yes. The answer is yes.

Q. Who contacted you and approximately when? A. Well, J. B. called me because he knew of my connection with the farm, I am sure. It was around right after there was a foreclosure sale that was advertised but never was consummated, never came off, that he called me and asked me if I thought that the farm was for sale.

Q. What was your answer? A. I didn't know.

Q. Do you remember when this foreclosure sale was advertised? A. No, I have no actual date.

Q. Could it have been in 1962? A. I am sure that there is a copy of that foreclosure notice. I wouldn't know the date.

Q. To what extent were you involved with Mr Shapiro in [11] the foreclosure sale advertisement? A. None whatever.

Q. Was there a written agreement between you and Mr. Shapiro concerning your transaction with him and the Clammer farm? A. None whatsoever.

Q. Approximately when did he contact you about this farm?

MR. MELROD: I think he answered that question.

THE WITNESS: Some time after the foreclosure sale.

BY MR. PAULSON:

Q. You cannot be more specific than that? A. No.

Q. What was said by him as to his prior dealings and interest in the farm? That is, concerning a purchase of the farm. A. To my knowledge, nothing was said about any prior dealings or prior information that he had on the farm. His original contact, as I recall the conversation, was something to the effect that if there was a foreclosure on it, "Do you think Mr. Clammer would be interested in selling it? If so, would you see if there is a possibility that he might be interested in selling it? If so, I might be interested in [12] buying it." It was what I would call a casual interest in the property.

Q. You know, of course, that Shapiro has purchased that property? A. Yes.

Q. That was purchased by way of a contract? You know that? A. Yes, sir.

Q. Who drew the contract? A. There were several contracts, I think. The final contract was drawn jointly by Morris Shapiro and myself and a man in his office. That is, the typing was done by someone in his office on a Saturday.

Q. Do you remember the purchase price of the property? A. The final purchase price of the property agreed on and sold, you mean?

Q. Yes, sir. A. $400,000.

Q. You mentioned more than one contract being involved. How much was the first contract offer that you were involved in? A. I think it was 350, as I recall.

Q. Is that $350,000? [13] A. Yes.

Q. When was that contract offer made, sir? A. I would say probably a week or ten days prior to the $400,000 contract.

Q. Was that your first contact with Mr. Clammer? A. No.

Q. When did you first contact him concerning Mr. Shapiro's interest in buying this farm? A. Oh, I would say I had several conversations with him that probably went back three or four weeks, five weeks prior to that.

Q. Prior to what? A. Prior to the drawing of the contract.

Q. Do you remember what your conversation was with him as to your interest in the property at that time? I am referring to your first contact with him. A. I will try to relate a conversation which I can't repeat word for word. I will give you the general idea.

I called him up and said, "Sam, I want to see you." He said, "Come on over." I said, "Are you interested in selling the farm?" and he said, "Everything is for sale, everything isn't for sale." He said, "Yes, I believe if I got what I wanted, I might be interested in selling," and we talked about [14] what the price might be, and so forth, and I believe at that time he said to me, "Under certain circumstances, if I got $400,000 net to myself, I might consider selling."

* * *

Q. Referring, sir, if we may, to the first contact which you stated was an offer of $350,000, was that a written contract? [15] A. Yes.

Q. Who was designated on that contract as the purchaser? A. Velasco, M. E. Velasco.

Q. Do you have a copy of that contract among your papers? A. No.

Q. Do you have any papers in your file concerning this transaction? A. No, none whatsoever.

Q. What if anything did Mr. Clammer ask you about M. E Velasco? A. He asked me who M. E Velasco was and I said, "M. E. Velasco is a straw. At the proper time it will be revealed, if necessary, who the actual buyer is. All I can do is assure you that the actual buyer will be financially able and competent to carry through a deal."

* * *

[17] Q. Did you ask Mr. Clammer if he had talked with any other buyers or brokers about selling this property? A. I asked him if the property had been on the market or if it was offered for sale, that I understood there were several advertisements in the paper which might have referred to

his [18] farm, and so forth, and he said to me, "Dave, I have not given this out as a listing, nor have I offered the farm for sale to anybody, and it is not on the market, it is not for sale, but if I were to receive an acceptable contract, I probably would sell it."

Q. Did he mention to you having any contact with Mr. Trundle? A. No. The name never was mentioned to me. I never heard of the name.

Q. Then do I understand you to say that you had never known Mr. Trundle before this law case came up? A. That's right. As far as I know, the name was a complete blank to me.

Q. Then Mr. J. B. Shapiro never mentioned Trundle's name to you? A. No.

Q. Nor did Morris Shapiro? A. No.

* * *

[19] Q. When you first were contacted by J. B. Shapiro, did he make any mention to you as to his knowledge of the farm or what information if any he had gathered prior to his contacting you? A. Well, in discussing the whole thing, I am sure that he must have said something to me like, "I don't want to go out and look at it because I know it. I have been out there with you and your father-in-law. I know the farm and I am not interested in the farming element as such. I know the layout. We can see it on the plat," so that I didn't go into any detail with J. B. Shapiro as to the pertinent things about a farm, such as road frontage, such as the usual thing, the approximate number of acres as I knew it.

* * *

[20] Q. In your various conversatons with J. B. Shapiro, did he or did he not make any mention to you of having prior contacts with any other brokers concerning the purchase of this [21] farm? A. The answer is definitely and absolutely no.

Q. Did you ask him if he had had any contacts with any other brokers? A. I don't recall whether the specific question was asked or not.

Q. That wouldn't have any interest to you then? A. Not at all. I was not a broker in the deal. I was representing Mr. Shapiro and performing a service for him.

Q. How much were you paid? A. $5,000.

Q. When were you paid? A. Prior to settlement. November the 2 – can I look and refresh my memory?

Q. Please do. A. I was paid on November the 18th.

* * *

[22] Q. Then I understand that you were not paid out of the purchase money for the farm? A. No.

* * *

[23] Q. When did you reveal to Mr. Clammer or both he and his wife who the real purchasers were in this transaction?

MR. LEONARD: I object to the form of the question. It is stating a fact not in evidence.

BY MR. PAULSON:

Q. Please answer the questions, sir. A. Now what am I supposed to do?

MR. MELROD: You may answer.

THE WITNESS: Repeat that.

(The pending question was read by the reporter.)

THE WITNESS: When I presented them the contract for $400,000 with the balance in the second mortgage.

* * *

[26] BY MR. PAULSON:

Q. Did Mr. Clammer at all times that you contacted him represent himself in this transaction? A. Yes.

Q. Did you ever deal with any other person, such as a member of his law firm, who represented him? A. No. I don't –

* * *

Excerpts from Deposition of Sam Clammer, March 10, 1966

* * *

SAM CLAMMER

* * *

[3] EXAMINATION BY COUNSEL FOR THE PLAINTIFF

BY MR. PAULSON:

* * *

[4] Q. Was there a time when you did some real estate work in your practice? A. Yes, I did in Tulsa, Oklahoma.

Q. When? A. That was prior to the war, World War II.

Q. How long have you been in Washington, sir, as a practicing attorney? A. Since 1946.

Q. The particular farm in question in Montgomery County and for the sake of brevity we might refer to it as the Clammer Farm, when did you first purchase that farm? [5] A. I believe it was September of 1952.

Q. Did you and your wife and Mr. George Fuller purchase it at that time? A. No, my wife and I purchased it at that time.

Q. When did Mr. Fuller obtain an interest in this farm? A. I believe that it was in 1953, 1954, right along in there.

Q. Is he related to you or your wife; A. No.

Q. Was he at that time a resident of California? A. Yes, sir.

Q. When you and your wife purchased the farm did you live at the farm? A. Yes, sir.

Q. How many acres did you buy, sir? A. Oh, it was over six hundred.

Q. Around six hundred and thirty some acres; would that be an approximation? A. Somewhere around that. I think it was more than that.

Q. Did you ever after you intiially purchased this six hundred and some acres purchase an additional plot of land? A. Never.

* * *

[6] Q. Do you recall having conversations with Mr. Trundle around 1960, 1961 or 1962 concerning the sale of

that farm? A. Yes, Mr. Trundle used to worry me to death coming up there to my office.

Q. Your office in Washington, D. C.? A. Yes.

Q. Do you recall when he first contacted you about [7] selling that farm? A. Oh, I don't remember when the first time he contacted me was.

Q. Could it have been around 1960 or 1961? A. Could have been.

Q. Well, do you recall when you first had contact with him about this, what conversation you had concerning the sale of the farm? A. He wanted to get a listing on the farm and I told him at that time it was not for sale, but I said everything is for sale except my wife and family and I said if I can get my price for it I will sell it. That was it.

He wanted to get a listing on the farm and I wouldn't give it to him. I refused to.

Q. You referred to a written listing, is that correct? A. Any kind of a listing. I wouldn't give him a listing on it.

Q. Do you recall mentioning to him during those conversations that you had that you wanted $400,000 net for the farm? A. I told him I would take $400,000 net for the farm, that I would pay no real estate commission.

Q. You knew Mr. Trundle was in the business of [8] selling real estate for a living, did you not? A. I knew that and I told him that if he wanted to sell that farm that I wanted $400,000 net to me and if he wanted to get a commission over and above that that was perfectly all right but he had to get it over and above that, that I would not agree to pay a real estate commission.

* * *

Q. Before you consummated this transaction when you and your wife sold this farm, before that time had you had any business dealings with Mr. J. B. Shapiro? A. No, I never had any business dealings with him.

* * *

[11] Q. Before Mr. Trundle contacted you about selling your farm had you had any contacts from other real

estate people about selling the farm? A. There were a number of people that came up and wanted to buy the farm, wanted to get a listing, wanted to have an exclusive, and I wouldn't give it to anybody.

* * *

[13] Q. Did you make any notation on this contract or have any conversation with Mr. Trundle about a different contract offer other than what you have already stated? A. No.

Q. Did Mr. Trundle say something to you about making a contract offer or something in writing to the buyer who was interested? A. Oh, he tried to get that a dozen times from me and I never did give it to him.

Q. What did you tell him he had to do or should do? A. I told him he should submit a contract for $400,000 net to me and I would consider it.

Q. After this contract was offered of $325,000 or thereabouts did Mr. Trundle contact you for the next year [14] approximately? A. Oh, I think he would drop into my office every now and then.

Q. Do you remember him stating to you that J. B. Shapiro was still interested in buying the farm? A. No. I do not.

Q. Do you know that J. B. Shapiro was interested in buying? A. I had no idea.

* * *

[15] Q. Before you purchased from Harry Sherby did you have any business dealings with David Simon? A. That was the one.

Q. Never knew him even socially before that time? A. No.

Q. Until the transaction when you sold to J. B. Shapiro [16] had you had any business transactions with him? A. I did not sell to J. B. Shapiro.

Q. Whom did you sell to? A. To M. E. Valasco.

Q. You did find out that that was a straw party? A. I did later, yes.

Q. When did you find out that? A. I expect a couple of weeks after I signed a contract, maybe longer.

* * *

[17] Q. Prior to the time of the signing of that contract for how long a period of time had Mr. David Simon been contacting you about that transaction? A. Oh, I don't know, I expect sixty days.

Q. When he first contacted you did he tell you who he represented? A. Did he what?

Q. When he first contacted you did he tell you who he represented? A. No, he did not.

Q. What did he say to you? A. He was trying to find out if I was interested in selling the farm.

Q. What did you tell him? A. I told him that I would sell it for $400,000 net to me, no real estate commission.

[18] Q. Did he indicate to you at that time or at any subsequent contacts that he had a buyer who was interested? A. He told me that he had a buyer who was interested, but he did not tell me who it was.

Q. You did not ask him? A. No.

Q. You were not interested? A. I was not interested.

Q. When this contract was submitted to you at the figure that was acceptable to you, and I presume that was $400,000 net to you, would that be correct? A. Yes.

Q. Was that the first time that you learned that Velasco was the contract purchaser? A. That is right.

Q. Did any other name appear on the contract as the purchaser? A. No.

Q. Did you meet Velasco at that time? A. No.

Q. Did you ever meet Velasco? A. No.

Q. You know that she was a woman or is a woman? [19] A. I did not know she was a woman.

Q. You did not know that? A. No.

Q. Did you make any inquiry as to who she was? A. No, but I said that before I closed on this, I said "I am going to be sure that the buyer is responsible and I will check through my banks to find out."

Q. Did you? A. I did.

* * *

[20] Q. You were told that Velasco was financially responsible? A. Yes.

Q. Were you told in what manner this person was finnacially responsible? A. Yes.

Q. What were you told? A. That she was being backed by Maurice and J. B. Shapiro.

Q. Was that the first time that you learned that this party was a straw? A. Yes.

MR. LEONARD: Wait a minute, did you learn that this party was a straw at that time?

[21] THE WITNESS: I did not know that she was a straw. I did not know even whether it was a he or she.

* * *

Q. Did you know why the property was being taken in her name in this case instead of that of J. B. Shapiro and Maurice Shapiro, the real parties in interest? A. No.

* * *

[25] Q. I will rephrase the question. Did you know the source of that deposit check, that cashier's check? A. No, I did not know.

Q. You did not inquire? A. I did not inquire.

Q. Did Mr. David Simon when he was contacting you about the time of this contract state to you that the real party in interest is J. B. Shapiro? A. No, he did not.

Q. Never at any time told you that? A. No.

* * *

[27] Q. Did Mr Trundle ever ask you or talk to you about a real estate commission for himself as a result of this sale by you and your wife of the farm? A. I think he did after it was all over but I wouldn't, I don't think he ever talked to me. He had half a dozen talks to me and I told him and explained to him what the situation was, and that was the last I heard from any of them until this suit was filed.

Q. Did Mr. Trundle talk to you about a commission for himself? A. I think he tried to get me to pay him a commission.

Q. What was your response to that? A. I told him absolutely not, that I would never agree to it.

* * *

[29] EXAMINATION BY COUNSEL FOR THE DEFENDANTS SHAPIRO AND VELASCO

BY MR. MELROD:

* * *

Q. Did you have any agreement of any nature whatsoever with Mr. Shapiro or Mrs. Velasco concerning not recording the deeds or anything of that nature? A. No.

* * *

Q. Did [30] you ever enter into any agreement with the defendants J. B. Shapiro or Velasco with the purpose in mind of defeating the commisson of the plaintiff? A. I did not understand that.

Q. Did you ever make any agreement of any nature with Mr. Shapiro or Velasco the co-defendant with the purpose in mind of defeating the plaintiff's commission in this case? A. No.

* * *

Q. When Mr. David Simon contacted you about selling did you have any conversation with him about how he would be paid his commission? A. I did not have any conversation with him about that at all. I just told him it was net to me and he would have to arrange over and above that.

* * *

Excerpts from Deposition of Maurice C. Shapiro, July 6, 1966

* * *

[3] MAURICE C. SHAPIRO

* * *

EXAMINATION BY COUNSEL FOR THE PLAINTIFF

BY MR. PAULSON:

* * *

[5] Q. When did you first become interested in being a purchaser of this farm? A. Brother called me one day and told me that the property was being advertised for sale at auction, and we drove out during the time that it was advertised, I think it was 1963, and drove over the property.

* * *

[10] Q. Now, when you went to the Clammer farm with your brother and Mr. Trundle, did you meet anybody there? A. We drove up to the side of the big house, the main house, and Mr. Clammer came out.

Q. That's Mr. Sam Clammer? A. That's right.

Q. – who is a party to this case? A. Yes, sir.

Q. Anybody else there? A. If they were, they may have been in the house. The only person that we saw was Sam Clammer – that I saw was Sam Clammer.

[11] Q. Did you go into the house? A. No, sir.

Q. Well, you did go onto the property, though; is that correct? A. We drove up to the house, to the side of the house, and that's where Mr. Clammer came out.

Q. What conversations did you have with Mr. Clammer? A. We didn't have any. Mr. Trundle said that he came to show the property, and Mr. Clammer said, "What right have you got, coming here? I didn't give you a listing on the property." As much as telling us to get the hell off. So we stayed there about two minutes and left, because we didn't have to be insulted by anybody.

Q. Did you get out of your car? A. No , sir, I didn't. I mean, they may have gotten out of the car. I was driving.

Q. You were driving? A. You see, we picked up Mr. Trundle and drove in my car.

Q. Well, did Mr. Trundle or your brother get out of the car? A. I think they did, they got out, because Mr. Clammer – we were all together. I think they may have gotten out. I'm [12] not sure.

Q. But you were close enough to hear this conversation between Clammer and Mr. Trundle; is that correct? A. We were all together, yes.

Q. After that conversation – A. Excuse me. I think I had my top down, even, in the car. That made it easier to hear, I mean to see what was going on.

Q. After that conversation, what did you do? A. We drove back, and I dropped Mr., we dropped Mr. Trundle off at his house.

Q. Other than driving up from the public road to this place where you met Clammer and back to the public road, did you drive onto any other part of the farm on that occasion? A. No, sir.

Q. I direct your attention just briefly back to the time when you and your brother inspected this farm at the time of the auction notice. Did you drive onto the farm on both sides of the road, or just on one side? A. We drove on the right side, the main side, the right side where the big house is, and we drove up to the back of the house, because I remember I had trouble turning around there. Back at the barn, I turned around and drove back.

[13] Q. At the time on this Saturday morning, as you best recall, when you and Trundle and your brother went up to this farm and had that conversation with Clammer, – A. Wait a minute. Now I remember. When I turned around, we drove beyond there to where the colored house is on the right, because I remember I hit a low spot there, and I wasn't familiar with the farm, and Trundle said, "You'd better let me guide you."

MR. LEONARD: Was this at the time of the auction visit?

THE WITNESS: No, he wasn't with us at the auction visit. This is when we drove in, drove through there, and then came up, and Mr. Sam Clammer came out. I don't

know whether Trundle knocked at the door – I think Mr. Clammer came out when he saw our car going through the property; I guess he figured, what's somebody doing, driving through there?

BY MR. PAULSON:

Q. How far were these colored houses or this colored house from the main house? A. I would say about 250, 300 feet.

Q. As you recall, did you drive on any other part of the farm on that occasion? [14] A. No, sir, because I almost got into the ditch when I was driving there.

Q. What time of day do you recall this? A. I think we picked Mr. Trundle up around 10 or 10:30, and it would take about 45 minutes to get out there. So I'd say it was in the neighborhood of 11:30, 12 o'clock.

* * *

[15] Q. When did you first understand, sir, that Mr. Clammer might be interested in selling his farm? A. When Mr. Trundle said he was a buddy of Mr. Clammer's and felt that he could get it for $350,000. But Mr. Clammer didn't even know Mr. Trundle when Mr. Trundle approached him at the house. He had to introduce himself.

* * *

[19] Q. Did there come a time, Mr. Shapiro, when you knew or learned of Mr. Clammer's demands as to what he wanted for his property? A. Yes.

Q. Do you recall when that was, sir? A. That was about the middle of '64.

Q. And by what means did you learn of this? A. Brother told me about it. He said, "He won't take [20] less than $400,000 net."

Q. And when did you say this was? A. '64. I'd say it was May or June.

* * *

[29] MR. PAULSON: Mr. Davis, are you stating to me that you have examined the file, and you state that there are no notes, either typewritten or handwritten, that pertain

to this transaction, or any other papers or documents, other than what have been identified as exhibits?

MR. DAVIS: Yes.

* * *

[30] [BY MR. PAULSON:]

Q. Now, after this property was purchased by you and your brother through the straw party, Velasco, did you have any contacts with Mr. Trundle pertaining to his requests or demands, if you put it that way, for a real estate commission? A. I did not, no, sir.

Q. Well, before this lawsuit was filed, did you learn that he had made a demand or request upon your brother for such a commission? A. I was told by Brother that Trundle had come in and claimed that there was a commission due him on the property.

Q. And do I understand you to say that you had no direct contacts with Mr. Trundle pertaining – A. No, sir.

[31] Q. – to his commission? A. No, sir.

* * *

[34] Q. Did you have only the one brief contact with Mr. Clammer at his farm concerning this farm? A. That is all.

Q. And did you yourself have any contacts with any other person, attorney, or broker, regarding this? A. No, sir.

* * *

AFFIDAVIT OF SAM CLAMMER

DISTRICT OF COLUMBIA, ss:

SAM CLAMMER, being duly sworn deposes and says:

1. I am a defendant in this action and make this affidavit in support of a motion by myself and Katherine Clammer, my wife, for summary judgment.

2. Except for the signing of formal papers, Katherine Clammer did not at any time take part in the sale of land which is the subject matter of this suit.

3. On deposition in this action I testified to the absence of any express or implied agreement between plaintiff and myself as shown in Exhibit A hereto and I hereby reaffirm the statements there made.

4. On deposition in this action plaintiff also testified to the absence of any agreement between plaintiff and myself as shown in Exhibit B hereto.

/s/ Sam Clammer

[Jurat]

ORDER

Upon the pleadings and other proceedings heretofore had herein, the motions of the respective defendants for summary judgment, the papers submitted in support thereof, the parties having been heard and the Court having on March 20, 1967, ruled in favor of all defendants on such motions, it is hereby:

ORDERED, that summary judgment be and is hereby granted this 31 day of March, 1967, in favor of defendants against the plaintiff and judgment shall be entered herein dismissing the Complaint with prejudice and with costs to defendants.

/s/ Matthews, J.
United States District Judge

NOTICE OF APPEAL

Notice is hereby given that A. D. Trundle, plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia from the granting of defendants' motions for Summary Judgment entered in this action on March 20, 1967. and the Order entered March 31, 1967.

SORRELL, JONES & PAULSON

By /s/ Richard S. Paulson

(20

BRIEF FOR APPELLEES CLAMMER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,027

A. D. TRUNDLE,

Appellant,

v.

SAM CLAMMER and
KATHERINE CLAMMER,

and

J. B. SHAPIRO,

and

M. E. VELASCO,

Appellees.

Appeal from the United States District Court
for the District of Columbia

DANIEL H. CROWLEY
1725 K Street, N. W.
Washington, D. C. 20006
Attorney for Appellees Clammer

Of Counsel:
LEONARD, CLAMMER, FLUES
& REDMON
1725 K Street, N. W.
Washington, D. C. 20006

STATEMENT OF QUESTIONS PRESENTED

That in the opinion of Appellees Clammer the questions are:

1. Why the directed verdict by the trial court should not be sustained denying Appellant a real estate broker commission, as there was no contract of agency, express or implied, between Appellant and Appellees Clammer, and Appellant was not the procuring cause of the sale of the property in question.

2. Why the directed verdict by the trial court should not be sustained, as there was no contract of agency, express or implied, between Appellant and Appellees Clammer upon which a tort action could be premised.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,027

A. D. TRUNDLE,

Appellant,

v.

SAM CLAMMER and
KATHERINE CLAMMER,

and

J. B. SHAPIRO,

and

M. E. VELASCO,

Appellees.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF THE CASE

The Appellees, Sam Clammer and Katherine Clammer, who were the defendants below, were the owners of a farm containing 635 acres, more or less, from 1952 until 1964. The farm, located near Beallsville, Montgomery County, Maryland, was purchased from a Harry Sherby who lived there some years.

The other Appellees are J. B. Shapiro and M. E. Velasco, who were defendants below. J. B. Shapiro has been in the real estate business in Washington since 1919 and is now married to M. E. Velasco, who took title to the farm in question from the Clammers (J.A. 16-17).

The Appellant, A. D. Trundle, plaintiff below, is a real estate broker doing business in Montgomery County, Maryland (J.A. 1).

Appellant Trundle first contacted Sam Clammer, Appellee, about selling the Clammer farm in 1960 or 1961 (J.A. 7, 10, 30). Appellant Trundle introduced himself to Appellee Sam Clammer at that time by handing him his business card and then asking him if his farm was for sale (J.A. 6, 14). Appellee Sam Clammer then replied that although he was not particular about selling it, he would sell it if he could get $400,000 net for the farm (J.A. 14, 30). Appellee Sam Clammer refused to give Appellant Trundle a listing on the farm (J.A. 12, 30). Subsequently, Appellant Trundle contacted Appellee Sam Clammer many times about selling the farm, but Appellee Sam Clammer's price was always $400,000 net to the Appellees Clammer (J.A. 15).

At the time of the original contact by Appellant Trundle to Appellee Sam Clammer there was no agreement that Appellee Sam Clammer would pay a real estate commission to Appellant Trundle out of the asked for price of $400,000 net, but Appellant Trundle was advised that any commission he might receive would have to be added to the $400,000 price (J.A. 30, 8, 10).

In searching for real estate to purchase in 1963, Appellant Trundle and Appellee J. B. Shapiro made contact with each other (J.A. 7). One weekend Appellant Trundle, Appellee J. B. Shapiro and his brother, Maurice Shapiro, went out to the farm of the Appellees Clammer (J.A. 9-10, 18-19). During the visit to the Appellees Clammer's farm by Appellant Trundle and Appellee J. B. Shapiro and his brother, Maurice, there was no discussion among the parties about buying the farm, nor was there any price mentioned or discussed at that time (J.A. 9, 18).

Shortly thereafter, Appellee J. B. Shapiro made a written offer to the Appellees Clammer for the farm in the amount of $320,000, which was taken to Appellee Sam Clammer by Appellant Trundle (J.A. 10). Appellee Sam Clammer looked at the price in the offer, said he was not interested in it and handed the written offer back to Appellant Trundle (J.A. 15).

After rejection of this offer by Appellee Sam Clammer, the Appellant again contacted Appellee J. B. Shapiro about the farm and Appellant Trundle was advised by Appellee Shapiro that he would make no more written offers until the Appellant received a written listing from the Appellees Clammer. Appellant Trundle then went back to Appellee Sam Clammer requesting a written listing and Appellee Sam Clammer refused (J.A. 12). Appellant Trundle then went back to Appellee J. B. Shapiro who indicated to the Appellant that he no longer wished to have any further business dealings with him as to the Clammer farm (J.A. 12-13).

In early July of 1964, David R. Simon, a Washington real estate broker, contacted Appellee Sam Clammer about selling the farm (J.A. 25-26, 32). At that time, Appellee Sam Clammer advised Simon that if he received $400,000 net to himself he might consider selling the farm (J.A. 26, 32). At this time, no names of any buyers were mentioned between Simon and Clammer (J.A. 32). Sometime prior to this meeting between Simon and Appellee Clammer the Shapiro brothers had contacted Simon about the Appellees Clammer's farm, as this was the same property which had previously been owned by Harry Sherby, who at one time had been Simon's father-in-law (J.A. 23-24).

During the first part of August 1964 Simon presented a $350,000 offer to the Appellees Clammer for their farm (J.A. 25). This offer, dated August 6, 1964, was written in the name of Appellee M. E. Velasco, buyer, a straw party. The offer was rejected by the Appellee Clammer (J.A. 26).

Immediately thereafter, Simon presented an offer to the Appellee Clammer in writing, dated August 8, 1964, in the amount of $400,000 net to the Appellees Clammer. This offer was accepted on August 11, 1964, by the Appellees Clammer. The purchaser under this accepted offer was M. E. Velasco, an Appellee herein. At the time of this acceptance, Simon advised the Appellees Clammer that M. E. Velasco, Appellee, was a straw party, that the principal parties would be revealed later at the proper time. Simon also assured the Appellees Clammer that the actual buyer would be financially able and competent to carry through a deal (J.A. 26, 32).

Settlement for the Clammer farm was made in December 1964, with a deed dated December 1, 1964 from the Appellees Clammer to Appellee Velasco.

SUMMARY OF ARGUMENT

The record, which in this case consists of depositions of the witnesses involved, shows without dispute that the Appellees Clammer never had any contract of agency with Appellant, that they had consistently refused to give him a listing. The record further shows that Appellee Sam Clammer made it extremely clear, as Appellant admits, that they, the Appellees Clammer, would not pay a commission, that they wanted $400,000 net for the farm, and that any real estate commission would have to be over and above that price. There is no dispute in the record that Appellant was unable to procure a buyer at the Appellees Clammer's price, that the best he could do was an offer that was refused by the Appellees Clammer, as it was $80,000 short.

It is the Appellee's argument that the substantive law of Maryland supports their position, that no contracts between the parties ever came about, and the Appellant was not the procuring cause of the sale.

It is also the contention of the Appellees Clammer that as no contract, either express or implied, was ever present between Appellant and the Appellees Clammer, Appellant's allegation of tort is entirely without foundation.

There is no conflict in the evidence as to these events, as Appellant Trundle's own deposition indicates. When the evidence and any inferences therefrom are viewed in a light most favorable to Appellant Trundle, he does not make out a case. Therefore, there were no issues to present to a jury and the trial court properly directed the verdict.

ARGUMENT

I

It is Not A Question of Disputed Facts, But the Directed Verdict by the Trial Court was Proper, As the Appellant had Not Made Out A Case with the Evidence and Inferences Therefrom Viewed In A Light Most Favorable to Him.

We are herein specifically concerned with a directed verdict by the trial court in favor of the Appellees. The multitude of cases on the law of directed verdicts state that all the evidence and the inference arising therefrom must be viewed in the light most favorable to the opposing party. See, *LaSalle National Bank v. 222 E. Chestnut Street Corporation*, C.A. Ill. 1965, 353 F.2d 680, *cert. den.*, 384 U. S. 938.

The case law interpreting Rule 50 of the Federal Rules of Civil Procedure does not support Appellant's contention that a directed verdict should not be granted where there are disputed facts, but the law of the cases is that all the evidence and all the inferences arising from the evidence, when viewed in a light favorable to the plaintiff, must support a *prima facie* case sufficient to go to a jury. *It is therefore not a question of whether evidence may be in conflict or not, but whether under*

this test the plaintiff has made out a case. U. S. v. Continental Can Co., D.C. N.Y. 1963, 217 F. Supp. 761. The evidence in this case, when put to such a test, clearly supports the directed verdict.

II

The Evidence and Inferences Therefrom, When Viewed In A Light Most Favorable to the Appellant, Do Not Support An Issue for a Jury As to Whether A Contract of Agency, Either Express or Implied, Existed Between Appellant and the Appellees Clammer.

Appellant would like to imply a contract of agency, between himself and Appellee Sam Clammer, when the testimony of both Appellant and Appellee Sam Clammer shows, without conflict, that none was meant to exist.

Appellant went to see Appellee Sam Clammer to obtain a listing of the farm, but Appellee Sam Clammer refused to give him such a contract (J.A. 12, 30). All that Appellee Sam Clammer told Appellant was that if Appellant would bring a $400,000 net offer to Clammer, it would be considered (J.A. 14, 30). There was never any agreement between Appellee Sam Clammer and Appellant Trundle as to how much commission Appellant would receive if he did bring a $400,000 net offer to Appellee Clammer, as it was clearly understood by Appellant Trundle that any commission would have to be added to the $400,000 price (J.A. 10).

In *B. Howard Richards, Inc. v. Shearer*, 45 A.2d 627, there was a similar situation, wherein the broker had no contract with the seller and could obtain a commission only if it found a purchaser willing to pay a net price to the owner. Like Appellant Trundle in the instant case, the broker in the *Shearer* case, *supra*, did not produce such a purchaser and the court, in its opinion on pages 638-9, held:

> "Appellant did not produce such a purchaser, so that it had no contract which the Appellee could have caused the owner to break. Appellant was in the same situation as a number of other brokers who might have had customers or prospects willing to pay less than the figure authorized by its owner. Neither Appellant nor any other broker who did have or might have had such property, could claim a contract with the owner. *The contract would exist only when the prospect had made an offer in accordance with the terms, which the owner said it was willing to accept.*" (628-629) (Emphasis supplied)

As there is no dispute in the testimony of Appellant Trundle himself that he did not find a buyer ready and willing to meet the owner's price, *Richards v. Shearer*, 45 A.2d 627, is conclusive precedent that no contract of agency ever came into existence between Appellant and the Appellee Clammer.

III

The Evidence and Inferences Therefrom, When Viewed In A Light Most Favorable to the Appellant, Clearly Indicate that Appellant was Not the Procuring Cause of the Sale and, Therefore, There was No Issue As Such to Submit to a Jury.

Appellant argues that the facts and inferences therefrom are sufficient for a jury to find that he was the procuring cause of the sale of the farm. The case law of Maryland holds to the contrary.

In *Leimbach v. Nicholson*, 149 A.2d 411, Article 2, Section 17 of the Maryland Annotated Code, upon which Appellant relies, was interpreted by the Court. In the *Leimbach* case, as in the instant case, the broker did not produce a purchaser ready and willing to buy at a price satisfactory to the owners. In that case the best offer that broker Nicholson was able to obtain was $115,000, less a commission of $5,000, while the sale effected was at a price $122,500 net to the owners. In

holding that Nicholson had failed, and was not the procuring cause of the sale, the court stated, at page 414:

> "The broker must establish, however, that he is the primary, proximate and procuring cause, and it is not enough that he may have planted the seed from which the harvest was reaped."

The evidence in this record and any inference that could possibly be drawn therefrom clearly show that Appellant Trundle, like broker Nicholson in the *Leimbach* case, *supra*, failed in procuring the end result of selling the Appellees Clammer's farm and, therefore, there is no issue as to the procuring cause of the sale for submission to a jury.

IV

As the Evidence Unequivocally Shows that There were No Agreements Between Appellant and the Appellees Clammer, the Statute of Frauds Is Not Relevant to this Matter.

As the Appellees Clammer show in their answer to Argument II above, there is no evidence to indicate that any contract ever existed between the Appellant and the Appellees Clammer! Therefore, the Statute of Frauds argument of the Appellant is not relevant.

V

As the Evidence and Inferences Therefrom, When Viewed In A Light Most Favorable to Appellant, Indicate There was No Contractual Relationship Between Appellant and Appellees Clammer, or any Such Issue to Submit to a Jury, There could be No Liability In Tort.

As we have shown in answer to Argument No. II above, the court, in *Richards v. Shearer*, 45 A.2d 627, held that as the broker had not found a purchaser that would pay the owner's price, the broker had no

contract with the owner which could be broken. This is precisely the situation in the instant case.

As Appellant Trundle's testimony repeatedly shows, the only arrangement that he had with Appellee Sam Clammer was that Appellee Sam Clammer wanted $400,000 net for the farm (J.A. 14-15). There was never any change in the arrangement or the price! (J.A. 15)

In *Leimbach v. Nicholson*, 149 A.2d 411, the broker, as in the instant case, was unable to procure a purchaser ready and willing to buy on terms satisfactory to the owner. The court held, on page 415:

> "If the broker has not met the conditions of his employment, the owner is not precluded from seeking other assistance by means of which a sale is ultimately effected on terms more familiar to him even though to the same prospect introduced by the first broker."

VI

It is Not A Question of the Credibility or Demeanor of Witnesses, But A Directed Verdict by the Trial Court was Proper, As the Appellant had Not Made Out A Case with the Evidence and Inferences Therefrom Viewed In A Light Most Favorable to Them.

Appellant argues that the District Court should not have directed the verdict against him because the issues and credibility of the witnesses should not be resolved by summary judgment. Such argument is entirely without basis because the court below found that without weighing the credibility of witnesses, there could be but one conclusion from the evidence, that a verdict should be directed without submission to the jury.

The evidence shows that there was no contract of agency existing between Appellant and Appellee Sam Clammer and that Appellant was not the procuring cause of the sale (see Arguments II and III above). Therefore, there was no need to weigh the credibility of witnesses, as there can be but one reasonable conclusion as to the verdict. *Woods v. National Life & Accident Insurance Co.*, C.A. Pa. 1965, 347 F.2d 760.

CONCLUSION

Appellees Sam Clammer and Katherine Clammer contend that the trial court should be sustained in directing a verdict against Appellant below, as the evidence and inferences arising therefrom show without question that Appellant, under the applicable law, did not make out a *prima facie* case sufficient to go to a jury.

Respectfully submitted,

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BRIEF FOR APPELLEES
J. B. SHAPIRO AND M. E. VELASCO

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,027

A. D. TRUNDLE,

Appellant

v.

SAM CLAMMER AND KATHERINE CLAMMER,

and

J. B. SHAPIRO AND M. E. VELASCO,

Appellees

Appeal from the United States District Court
For the District of Columbia

Leonard S. Melrod

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STATEMENT OF QUESTION PRESENTED

In the opinion of Appellees Shapiro and Velasco, the only question presented by this appeal relevant as against them is:

1. Whether the lower court erred in granting the Motion for Summary Judgment filed by Shapiro and Velasco, defendants below, against Appellant's claim set forth in Count Two of the Complaint for compensatory and punitive damages for tortious interference with an alleged contractual relationship between the appellant, plaintiff below, and appellees Sam Clammer and Katherine Clammer, defendants below.

INDEX

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BRIEF FOR APPELLEES, J. B. SHAPIRO AND M. E. VELASCO

COUNTERSTATEMENT OF THE CASE

Appellees Shapiro and Velasco deem it necessary to add the following Counterstatement of the Case:[1]

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[1] This brief, filed on behalf of Appellees Shapiro and Velasco, directs itself solely to the correctnees of the lower court's entry of judgment on their motion

(Continued)

A. D. Trundle, plaintiff below, is a resident of Montgomery County, Maryland and a licensed real estate broker engaged principally in the business of brokering large tracts of land in Montgomery County, Maryland. (J.A. 1) Appellees Sam Clammer and Katherine Clammer, defendants below, and George Fuller, a California resident, from 1952 to 1964 were owners of certain real estate, a farm located in Montgomery County, Maryland containing approximately 635 acres, more or less, located on Route 28, Beallsville, Montgomery County, Maryland. (J.A. 2) Appellee J. B. Shapiro, defendant below, at said times was and is a real estate broker, speculator and builder, having been in business since 1919, who was contacted several times by the appellant about buying the farm in question and who, in 1964, purchased the farm through a straw party, appellee M. E. Velasco, now known as Mrs. J. B. Shapiro, defendant below, who subsequently deeded the property over to J. B. Shapiro and his brother, Maurice Shapiro. (J.A. 2)

In 1960 or 1961 A. D. Trundle approached and discussed with Sam Clammer the matter of selling his farm, the latter stating in effect, that he was not too anxious to sell. Each time Trundle spoke with Sam Clammer regarding the asking price for the farm, Sam Clammer told Trundle that the price for the farm was $400,000.00 net to the sellers

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(footnote continued from page 1)
for summary judgment on count two of the complaint. Those portions of appellant's brief directed to the question of the lower court's decision on the Supplemental Motion for Summary Judgment filed by Sam Clammer and Katherine Clammer with respect to count one and count two of the complaint are not relevant to a decision by this court insofar as this appeal affects Shapiro and Velasco. The merits of this appeal as to Shapiro and Velasco are exclusive of those pertaining to Sam Clammer and Katherine Clammer.

(J.A. 6, 8, 10, 14, 15, 30, 31, 32) Each time the subject of the payment of a real estate broker's commission was discussed between Trundle and Sam Clammer, Sam Clammer told Trundle that the sellers would not pay a real estate broker's commission. (J.A. 6, 10, 14, 15, 30, 31, 32) Trundle suggested to Sam Clammer that he, Trundle, would have to price the farm at $700 per acre in order that he might receive compensation for his efforts to the extent the purchase price exceeded $400,000.00, net to the sellers. (J.A. 6).

In the spring or early summer of 1963, J. B. Shapiro contacted Trundle, stating in effect, that he had $1,000,000.00 to invest and wanted to know what he, Trundle, had to offer. Thereafter, Trundle went to Shapiro's office and brought several properties to his attention. (J.A. 7)

Trundle and Sam Clammer, J. B. Shapiro and his brother Maurice Shapiro met at the farm in late summer or early fall of 1963 and viewed the property, although the length of time spent there and how much of the farm and improvements were viewed is in dispute. (J.A. 7, 9) J. B. Shapiro never had any prior dealings with Sam Clammer and, in fact, did not recall ever having met him before. (J.A. 17) J. B. Shapiro, on prior occasions, was a social guest of a former owner, Harry Sherby, but was not familiar with the farm for the purpose of buying it. (J.A. 17)

A. D. Trundle never had any understanding or agreement with J. B. Shapiro for the purchasers to pay a real estate broker's commission to Trundle. (J.A. 11, 13)

Thereafter, on or about October 14, 1963, J. B. Shapiro through Trundle, submitted to Sam Clammer a contract offer to purchase the farm for $320,000.00 accompanied by a $25,000.00 deposit check signed by him. (J.A. 10, 11) This contract offer contained a five percent broker's commission. (J.A. 11) Thereafter, Trundle attempted to contact J. B. Shapiro over the following months but was unable to

see him or talk to him about the farm, giving Trundle the impression that Shapiro was avoiding him. (J.A. 12)

David Simon, a real estate broker in Washington, D. C. but not licensed in Maryland, was contacted by J. B. Shapiro sometime in June or July, 1964, concerning the farm. (J.A. 24) He was paid a $5,000.00 fee by J. B. Shapiro for allegedly negotiating the contract. (J.A. 28) Simon submitted a $350,000.00 contract offer dated August 6, 1964 to Clammer which was rejected. (J.A. 25) A contract dated August 8, 1964 in the amount of $400,000.00 net to the seller was accepted August 11, 1964 by Sam Clammer and Katherine Clammer. (J.A. 25)

J. B. Shapiro and Maurice Shapiro in May or June of 1964, knew that Sam Clammer would not take less than $400,000.00 net. (J.A. 37) When the contract offer that was accepted was presented to Clammer, Simon revealed who the real purchasers were. (J.A. 28) Title to the farm was conveyed by deed from sellers to M. E. Velasco who subsequently conveyed the property to J. B. Shapiro and his brother Maurice Shapiro. (J.A. 21) Velasco, a straw party, paid nothing toward the purchase of the farm. (J.A. 19)

Action was brought by A. D. Trundle (Plaintiff) against Shapiro, Velasco, Sam Clammer and Katherine Clammer in two counts. In count one, A. D. Trundle sought damages against Sam Clammer and Katherine Clammer for a real estate broker's commission. Trundle did not assert a claim against Shapiro and Velasco for a real estate broker's commission. In count two of the complaint, Trundle sought damages against Sam Clammer and Katherine Clammer and J. B. Shapiro and M. E. Velasco for tortious interference with an advantageous contractual relationship which Trundle claimed existed between himself, as broker and Sam Clammer, on behalf of the sellers.

Answers were filed on behalf of each of the defendants and thereafter pretrial depositions were taken of A. D. Trundle, J. B. Shapiro, Sam

Clammer, David R. Simon and Maurice C. Shapiro. Subsequent thereto, J. B. Shapiro and M. E. Velasco filed a Motion for Summary Judgment and Memorandum of Points and Authorities, in support thereof. Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9(h) of the United States District Court Rules, Shapiro and Velasco also filed a statement of the material facts as to which they contended there was no genuine issue. (J.A.) Sam Clammer and Katherine Clammer filed a Supplemental Motion for Summary Judgment and Affidavit of Sam Clammer. The plaintiff below then filed a Motion to Continue Hearing on the Motions for Summary Judgment Pending Further Discovery, or in the Alternative, Opposition to Motions for Summary Judgment by Defendants and a Memorandum of Points and Authorities in Support Thereof.

The plaintiff below did not file a counterstatement of facts as to which he contended there were genuine issues to be litigated as required by Local Rule 9(h).

The Court below heard oral argument on the Motion for Summary Judgment filed by Shapiro and Velasco and on the Supplemental Motion for Summary Judgment filed by Sam Clammer and Katherine Clammer and entered judgment on both motions as to both count one and count two of the complaint.

STATUTE INVOLVED

Article 2, Section 17, Annotated Code of Maryland (1957 Edition):

"When Real Estate Broker Entitled to Commission.

> Whenever, in the absence of special agreement to the contrary, a real estate broker employed to sell, buy, lease or otherwise negotiate real or leasehold estates or mortgages, or loans thereon, procures in good faith a purchaser, seller, lessor or lesseee, mortgagor or mortgagee, borrower or lender, as the lease [case] may be, and the person so procured is accepted as such by the employer, and enters into a valid,

binding and enforceable written contract of sale, purchase, lease, mortgage, loan or other contract, as the case may be, in terms acceptable to the employer, and such contract is accepted by the employer and signed by him, the broker shall be deemed to have earned the customary or agreed commission, as the case may be, whether or not the contract be prevented, hindered or delayed by any act of the broker."

RULES INVOLVED

Rules of the United States District Court for the District of Columbia, Rule 9(h):

"MOTIONS FOR SUMMARY JUDGMENT. In addition to the points and authorities required by subparagraph (b) of this Rule there shall be served and filed with each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure a statement of the material facts as to which the moving party contends there is no genuine issue.

"Any party opposing the motion may, not later than three days prior to the hearing, serve and file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.

"In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion."

Federal Rules of Civil Procedure, Rule 56(b), (c) and (e):

"(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be

rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interrogatory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

"(e) FORM OF AFFIDAVITS: FURTHER TESTIMONY: DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

SUMMARY OF ARGUMENT

I. The lower court properly determined from the uncontroverted Statement of Material Facts in Support of the Motion for Summary Judgment filed by Shapiro and Velasco and the pleadings and depositions on file that there were no genuine issues of material fact in dispute to be tried.

II. The lower court properly determined, as a matter of law, that Shapiro and Velasco could not be liable to Trundle either under the theory of Trundle's totally unsupported claim set forth in count two of the complaint or under the circumstances shown by Trundle's own deposition testimony because, as the undisputed facts seem to establish

conclusively: (1) the sellers insisted on a $400,000.00 net price, so that Trundle would be compensated only if and to the extent the purchase price exceeded that amount and Trundle has simply failed to procure a purchaser willing to buy at a price which met the sellers' terms and which would also provide an excess as a reward for Trundle's efforts, and (2) Trundle had no contract with Sam Clammer entitling Trundle to an agreed amount of compensation which Shapiro and Trundle could have caused Sam Clammer to breach. *B. Howard Richards v. Shearer*, 45 A. 2d 627, 186 Md. 36 (1946); *Leimbach v. Nicholson*, 149 A. 2d 411, 219 Md. 440 (1959).

ARGUMENT

I.

THE LOWER COURT PROPERLY DETERMINED FROM THE UNCONTROVERTED STATEMENT OF MATERIAL FACTS IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT FILED BY SHAPIRO AND VELASCO AND THE PLEADINGS AND DEPOSITIONS ON FILE THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT IN DISPUTE TO BE TRIED.

It is axiomatic that the summary judgment procedure is designed to eliminate the necessity of trying cases which involve no real factual issues. *Dewey v. Clark*, 180 F. 2d 766, 86 U.S. App. D.C. 137 (C.A.D.C. 1950); *Smith v. Leventhal*, 97 A. 2d 139 (D. C. Mun. App. 1953). It permits a determination that on the established facts the moving party is entitled to judgment as a matter of law. This principle was perhaps most clearly stated by Judge, later Justice Cardozo in *Richard v. Credit Suisse*, 242 N.Y. 346, 152 N.E. 110 (1926):

> "The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment

> from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial."

Faced with the vexing charge in count two of the complaint with having conspired to intentionally interfere with an allegedly advantageous contractual relationship between Trundle and Sam Clammer, Shapiro and Velasco took and were subjected to pre-trial depositions in an effort to elicit sworn testimony with which to separate what was "formal or pretended" in count two of the complaint from what is "genuine and substantial." The product of that pre-trial deposition testimony, relevant portions of which are incorporated in the Joint Appendix, was on file and before the court below. From all of the relevant pre-trial deposition testimony, but especially from the depositions of A. D. Trundle and Sam Clammer, Shapiro and Velasco gleaned the clear and undeniable facts which were material and decisive to the issue of their liability, if any, as claimed in count two of the complaint. These relevant facts were set forth in their Statement of Material Facts (J.A.), and filed in the Court below in support of their Motion for Summary Judgment, as required by Rule 9(h) of the Rules of the United States District Court for the District of Columbia. In substance, these relevant facts were that Sam Clammer, the seller, repeatedly told A. D. Trundle, the real estate broker, that the sellers would pay no real estate broker"s commission (J.A. 6, 10, 14, 15, 30, 31, 32, 33, 34), that the sale price was to be $400,000.00 net to the sellers (J.A. 6, 8, 10, 14, 15, 30, 31, 32), and that in the event Trundle or any broker secured a purchase price for the property in excess of $400,000.00, Trundle or any broker would be entitled to the excess (J.A. 6, 10, 11, 14, 30). The deposition testimony of Trundle and Sam Clammer further supported the facts set forth in the Statement of Material Facts to the effect that Trundle did not have an exclusive listing, that Sam Clammer insisted, in all of his dealings with Trundle and Simon, upon a sale price of $400,000 net to the sellers which he subsequently obtained from Velasco as straw for Shapiro and

that Trundle had been unsuccessful in securing an offer in that amount.

Contrary to the requirements of Rule 9(h) of the Rules of the United States District Court for the District of Columbia, the plaintiff below did not "serve and file a concise statement of genuine issues setting forth all material facts as to which [he] contended there exists a genuine issue necessary to be litigated." Because the plaintiff below failed to file a statement in opposition to Shapiro's and Velasco's motion stating such facts as he claimed to be actually in good faith controverted, the lower court was correct, pursuant to Rule 9(h), in assuming the facts as claimed by Shapiro and Velasco, to be "admitted to exist without controversy".

Interpreting a similar municipal court rule, the Municipal Court of Appeals for the District of Columbia held that the trial judge had the right to decide factual questions in favor of the moving party's Motion to Dismiss or for Summary Judgment supported by an affidavit where the opposing party could have but failed to file a counter-affidavit. *Adams v. District of Columbia,* 122 A.2d 765 (D.C. Mun. App. 1956).

Summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is applicable where the opposing party offers no controverting evidence to that introduced by the moving party. *Magee v. Coke-Cola Co.,* 232 F.2d 596 (C.A. 7, 1956). If testimony presented by the moving party is such that a directed verdict would have to be granted, it has been held that the courts are justified in granting summary judgment unless affirmative testimony is offered to discredit the testimony presented by the moving party. *Byrnes v. Mutual Life Insurance Co. of New York,* 217 F.2d 497 (C.A. 9, 1955).

That the adverse party must respond and set forth specific facts showing that there is a genuine issue for trial and that if he does not so

respond, summary judgment shall be entered against him is now well settled by the 1963 Amendment to Subdivision (e) of Rule 56 of the Federal Rules of Civil Procedure. *Moore's Federal Practice Rules Pamphlet,* Mathew Bender & Co., N.Y. 1966, pp. 941-942. Under Rule 56(e) as under local Rule 9(h), the adverse party is not permitted to rest upon mere allegations of his pleading. "Stubborn reliance upon allegations and denials in the pleadings will not alone suffice, when faced with materials showing the absence of triable issues of fact." *Moore's Federal Practice, Rules Pamphlet, supra,* p. 942.

Shapiro and Velasco were therefore clearly entitled to have the lower court assume the facts as claimed by them to be admitted without controversy pursuant to Rule 9(h). On those facts the lower court could not have drawn any other conclusion but that Trundle did not have a contract with Sam Clammer for the payment of a real estate broker's commission which could have been tortiously interfered with by Shapiro and Velasco.

But irrespective of his assumption to which it is claimed, Shapiro and Clammer are entitled under Rule 9(h), the conclusion is amply and conclusively supported by A. D. Trundle's own pre-trial deposition testimony. (J.A. 6, 8, 10, 14, 15) Nowhere, in the pre-trial deposition testimony of A. D. Trundle or any of the other parties or witnesses to this action has there been any challenge to the facts upon which this conclusion rests.

Where there is no genuine issue of fact in the case, the entry of a summary judgment is proper. *Dewey v. Clark, supra; Jeffress v. Weitzman,* 221 F.2d 542 (C.A. D.C. 1955); *Sedgwick v. National Savings & Trust Co.,* 76 U.S. App. D.C. 177, 130 F.2d 440 (App. D.C. 1942).

The question presented by this appeal is not unlike that before the court in *Blyther v. Pentagon Federal Credit Union,* 182 A.2d 892 (D.C.

Mun. App. 1962). At issue was the question of whether the parties had executed a novation. The trial court, on Motion for Summary Judgment, found that the record failed to show any facts to support the existence of a true novation and granted judgment on the motion. On appeal, the judgment was affirmed. It was held to be "well settled that if the pleadings, affidavits, and depositions show there is no genuine issue of any material fact, then the movant is entitled to summary judgment as a matter of law". 182 A.2d at page 894. The opinion reads:

> "The record, which has been carefully evaluated, fails to show any mutual intent by all the parties to substitute a new obligation in place of the old ones or a discharge of the two prior loans and a release from further legal responsibility therefore. Absent any facts to support appellants' claim of a true novation, summary judgment in favor of appellee was properly granted on the complaint." 182 A.2d at page 894.

In the instant case, the decisive question is whether Trundle and Clammer had a contract which would have entitled Trundle to a real estate broker's commission. Absent such a contract Shapiro and Velasco would have no liability for tortious interference. Shapiro's and Velasco's uncontroverted Statement of Material Facts and the depositions on file clearly and conclusively negated the existence of a contract between Trundle and Clammer entitling Trundle to a real estate broker's commission. Therefore, the essential and decisive fact which would support Trundle's claim advanced in count two of the complaint is absent. Accordingly, the summary judgment entered by the lower court in favor of Shapiro and Velasco was properly granted.

II.

THE LOWER COURT PROPERLY DETERMINED, AS A MATTER OF LAW, THAT SHAPIRO AND VELASCO COULD NOT BE LIABLE TO TRUNDLE EITHER UNDER THE THEORY OF TRUNDLE'S TOTALLY UNSUPPORTED CLAIM SET FORTH IN COUNT TWO OF THE COMPLAINT OR UNDER THE CIRCUMSTANCES SHOWN BY TRUNDLE'S OWN DEPOSITION TESTIMONY BECAUSE, AS THE UNDISPUTED FACTS SEEM TO ESTABLISH CONCLUSIVELY: (1) THE SELLERS INSISTED ON A $400,000.00 NET PRICE, SO THAT TRUNDLE WOULD BE COMPENSATED ONLY IF AND TO THE EXTENT THE PURCHASE PRICE EXCEEDED THAT AMOUNT AND TRUNDLE HAS SIMPLY FAILED TO PROCURE A PURCHASER WILLING TO BUY AT A PRICE WHICH MET THE SELLERS' TERMS AND WHICH WOULD ALSO PROVIDE AN EXCESS AS A REWARD FOR TRUNDLE'S EFFORTS, AND (2) TRUNDLE HAD NO CONTRACT WITH SAM CLAMMER ENTITLING TRUNDLE TO AN AGREED AMOUNT OF COMPENSATION WHICH SHAPIRO AND TRUNDLE COULD HAVE CAUSED SAM CLAMMER TO BREAK.

Appellant takes the position that there is a disputed fact as to whether Trundle was the procuring cause of the ultimate sale to Shapiro and that therefore summary judgment should not have been entered by the lower court. There is a dispute between the parties as to whether a newspaper advertisement of an auction sale and Shapiro's prior familiarity with the Clammer Farm or whether Trundle's efforts were the procuring causes of the ultimate sale.

But, this disputed fact raised by Trundle is not material to his claim against Shapiro and Valesco as set forth in count two of the complaint. Where, as here, there is an issue under the pleadings and there is, in fact, no dispute as to the *controlling* material facts, the lower court may properly enter judgment on behalf of the moving party. *Dewey v. Clark, supra; Durasteel Co v. Great Lakes Steel Corp.*, 205 F. 2d 438, 441 (C.A. 8, 1953); *Neff v. World Publishing Company*, 349 F.2d 235 (C.A. 8, 1965). The summary judgment proceeding is properly invoked even though the pleadings may on their face present a factual controversy. *Rubenstein v. Dr. Pepper Co.*, 228 F.2d 528 (C.A. 8, 1955).

The undisputed material and controlling facts seem to establish conclusively that Sam Clammer insisted upon a sale price of $400,000.00 net to the sellers, so that Trundle would be compensated only if and to the extent the sale price exceeded that amount. Therefore, even if Trundle was employed by Sam Clammer and was the procuring cause of the sale and even if Shapiro had negotiated the sale through Trundle, Trundle would not have earned a broker's commission. He simply failed to procure a purchaser willing to buy at a price which would meet the sellers' terms and also provide him some reward out of the excess for his efforts.

Even if Trundle was employed by Sam Clammer and even if Trundle were the procuring cause of the sale, no conduct on Shapiro's part to circumvent Trundle could have deprived Trundle of a fixed commission because it is clear from the undisputed facts that Trundle's and Clammer's agreement specifically excluded a fixed commission. Furthermore, no action on Shapiro's part could have deprived Trundle of a statutory commission under Article 2, Section 17, Annotated Code of Maryland, because the statute is applicable only "in the absence of a special agreement."

From the undisputed facts and depositions on file, the lower court could have determined that an understanding existed between Trundle and Clammer which entitled Trundle to any excess over the $400,000.00 net selling price. This understanding was a "special agreement" precluding Trundle from a statutory commission.

Heslop v. Dieudonne, 120 A.2d 668, 209 Md. 201 (1956) cited by Appellant is not authority for the application of the Maryland Broker's Commission Statute to the facts of the case at bar. The opinion indicates only that the sellers had advised the broker of their lowest net selling price. There is nothing in the opinion to suggest the existence of a special agreement such as is present in the instant case. *Heslop* merely applied Article 2, Section 17 of the Maryland Code to a factual situation in which

it was meant to apply, i.e., "in the absence of special agreement to the contrary."

If, therefore, Trundle was the procuring cause of the ultimate sale he would not have been entitled to a real estate broker's commission from the sellers either by virtue of his "special agreement" with Sam Clammer or pursuant to the provisions of Article 2, Section 17, Annotated Code of Maryland. Accordingly, whether or not Trundle was employed by Sam Clammer or was the procuring cause of the sale is not a controlling material fact, at least, insofar as a decision on Shapiro's and Velasco's Motion for Summary Judgment is concerned. The lower court properly entered judgment in favor of Shapiro and Velasco.

The applicable law on the question presented by this appeal has been announced by the Court of Appeals of Maryland in a case directly on point. *B. Howard Richards, Inc. v. Shearer,* (1946) 45 A.2d 627, 186 Md. 36. There, as here, plaintiff-broker, sought damages in tort against defendant-purchaser for wrongfully inducing the seller to breach his contract with the broker. The evidence established that plaintiff had a listing to sell certain real estate; that under no circumstances was the seller to be liable to pay a broker's commission unless a sales contract presented by plaintiff was accepted by the seller; that plaintiff solicited various offers from the defendant, none of which met the seller's terms; that thereafter though he continued to solicit offers he was never able to get the defendant to meet the seller's price; and, that subsequently the seller made an agreement directly with the defendant's nominee for the purchase of the property at the seller's asking price which was in excess of that which the defendant had previously offered. No commission was paid by the seller to the broker.

The Court held:

> "On these facts, it appears that the appellant in 1944 had no contact with the owner to sell the property for any figure although

> it did have an arrangement by which it would obtain the usual commission if it brought a purchaser to the owner who would pay his $125,000.00 net or $130,000.00 gross. *Appellant did not produce such a purchaser, so that it had no contract which the appellee could have caused the owner to break.* Appellant was in the same situation as a number of other brokers who might have had customers or prospects willing to pay less than the figure authorized by its owner. Neither appellant nor any other broker, who did have or might have had such prospects, could claim a contract with the owner. The contract would exist only when the prospect had made an offer in accordance with the terms which the owner said it was willing to accept." (Emphasis added) 45 A.2d at 628.

In answer to plaintiff's allegation that the purchaser induced the seller to let the property go at a lower price in order to save having to pay plaintiff a commission, the Court noted:

> "The appellee had never offered to pay through appellant more than $120,000.00 net or $125,000.00 gross so that it was not a question of saving the commissions at all . . . It does not appear that appellee had ever been willing to go as high as he finally did, until the contract was made." 45 A.2d at 629.

Finding therefore, that, as in the case at bar, "*The difficulty in the appellant's case is not with the law but with the facts,*" the Court concluded, as this Court should:

> ". . . appellant has failed to substantiate its case, both with respect to the establishment of a contract which it had, and with respect to the wicked and unlawful contrivance by the appellee to injure it, by inducing a breach of contract. . ." 45 A.2d at 629.

Additional and controlling authority is found in the case of *Leimbach v. Nicholson,* (1959) 219 Md. 440, 149 A.2d 411, also an action against purchasers for alleged tortious interference with a contract for brokers' commissions on the sale of real estate. After directing a verdict in favor of the purchasers, the trial court entered judgment for the plaintiff-broker against the vendor. The Court of Appeals of Maryland reversed,

holding that the broker was not entitled to recover for a broker's commission when he failed to produce a purchaser ready and willing to buy at a price satisfactory to the owner who thereafter sold the property through another broker for more money to the nominee of a prospect introduced by the plaintiff. In the *Leimbach* case as in the case at bar, the plaintiff-broker did not have an exclusive agency, and he was not able to elicit an offer from his prospect which met the seller's terms. There the contractual relationship between the broker and the seller was unilateral, the seller to pay a commission only if the broker produced a buyer ready and willing to meet the owner's price. While in the case at bar, the uncontroverted facts established that there was no contract for the payment by the seller of any commission whatsover.

Furthermore, the Court of Appeals of Maryland, reversing the broker's judgment, recognized by implication that under circumstances on all fours with the case at bar, the prospect is not exposed to liability for tortious interference merely because he ultimately purchases the property. The Court held:

> "If the broker has not met the conditions of his employment, the owner is not precluded from seeking other assistance by means of which a sale is ultimately effected on terms more favorable to him, even though to the same prospect introduced by the first broker," 149 A.2d at 415 and cases there cited.

The rule denying recovery as set forth by the Court of Appeals of Maryland in *Richards* and *Leimbach, supra,* governs the facts of the instant case. Trundle at no time had an employment contract with Clammer and, if there was any contractual relationship between them, that relationship explicitly omitted any obligation on Clammer's part to pay Trundle a broker's commission. If there was any contractual relationship, at best, it entitled Trundle to find a purchaser ready, willing and able to purchase the Clammer farm for a price in excess of $400,000.00 net to the sellers, in which event Trundle would have been entitled to

the excess. This Trundle failed to do. Accordingly, it must follow that Trundle had no contract with Clammer which could have been tortiously interfered with by Shapiro and Velasco. Trundle has cited no cases to challenge the law set forth in *Richards & Leimbach, supra,* both of which he has ignored.

CONCLUSION

The conclusion applicable to this appeal was nicely set forth in the opinion of the Municipal Court of Appeals for the District of Columbia, in *Reyman v. Edward H. Jones & Co.*, 96 A.2d 42, 44 (D.C. Mun. App. 1953). It reads:

> "Summary Judgments, as we have said on other occasions, should be granted cautiously. But when the facts are as clear as they are here, and the applicable legal standards are equally clear and lead to but one conclusion, it is not error to follow that lead and decline to impose liability where none exists."

Respectfully submitted,

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